Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

ROBERT MATICAN,

Petitioner,

v.

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ and CHRIS ZIMMERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a situation in which a state executive official has time to deliberate but is faced with the pull of competing obligations, that official may be liable under 42 U.S.C. § 1983 for a violation of substantive due process only if an individual proves the official acted with intent to harm the individual, when the individual has sustained physical injury by virtue of a danger created by the official.

2. When a state executive official is faced with an obligation that runs contrary to protecting an individual's substantive due process liberty interest, under what circumstances is the state's competing obligation of such great importance that the official may be liable under 42 U.S.C. § 1983 for infringing upon that liberty interest only if the individual proves the official acted with intent to harm the individual?

3. Whether a confidential informant who, in providing the police with information leading to the arrest of his drug dealer, has been exposed to danger, and has been given a false sense of security by the police, is in a "special relationship" with the police that may give rise to liability on the part of the police for violation of the informant's substantive due process rights in the event of an injury to the informant.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner here and appellant below is Robert Matican ("Matican").

The respondents here and appellees below are the City of New York ("City"), John Schneider ("Schneider"), Julio C. Ordonez ("Ordonez"), and Chris Zimmerman ("Zimmerman").

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Matican v. City of New York*, 524 F.3d 151 (2d Cir. 2008), and is reprinted in the Appendix to the Petition ("App.") at 1a. The District Court's opinion is reported at *Matican v. City of New York*, 424 F. Supp. 2d 497 (E.D.N.Y. 2006), and is reprinted at App. 18a. The Court of Appeals' denial of Matican's motion for rehearing and rehearing *en banc* is unreported, and is reprinted at App. 42a.

JURISDICTION

The Court of Appeals entered its judgment on April 23, 2008. The Court of Appeals denied Matican's timely motion for rehearing and rehearing *en banc* on June 26, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."

2. The Civil Rights Act of 1871, 42 U.S.C. § 1983 ("§ 1983"), provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

I. Factual Background

Matican was arrested for possession of a controlled substance, and while in police custody, police officers, Schneider and Zimmerman, conceived of a plan (hereafter, the "Sting"), pursuant to which they would arrest Matican's drug dealer ("Dealer"), whose real name Matican did not know. Matican was to participate as a confidential informant ("CI"), by contacting Dealer to arrange a drug purchase at a location previously used for such purchases. When Dealer arrived at the Sting site, the police would stop him for making the illegal U-turn he customarily executed at that location, then use the traffic stop as a basis for searching him for drugs. The police assured Matican that they would "look after" him were Dealer to be released on bail and seek vengeance against him, and that in any event if Dealer possessed at the time of his arrest as much drugs as Matican anticipated, Dealer would not make bail. These assurances lulled Matican into a false sense of security, leading him to agree to participate in the Sting.

The Sting was executed the day of its conception. Instead of Matican meeting Dealer at the designated site, at least five police officers, both in plainclothes and in uniform, from at least three cars, both marked and unmarked, confronted Dealer,[1] who was found to be in possession of crack cocaine and marijuana. Upon being brought to the police station, Dealer's real name was

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1. Ordonez was a police captain and the precinct's presiding officer, and participated in the Sting.

revealed to be Steven Delvalle ("Delvalle"), a check of his arrest record revealing arrests for numerous violent offenses, including gun possession and assault with a box cutter. Further inquiry by the police would have revealed that Delvalle had prior convictions for, *inter alia*, assault in the second degree (using a box cutter) and possession of a loaded firearm. Notwithstanding the police assurance to Matican that Dealer would remain incarcerated, Delvalle was released on bail on September 28, 2001. Matican, who was not informed of Delvalle's real name, violent history, or release, deposed that he would have left the state had these facts been made known to him.

On December 8, 2001, Delvalle assaulted Matican, slashing him twice across the face with a box cutter and stating, "You ratted me. . . . Why did you rat me?" Matican's injuries required 272 stitches and resulted in nerve and muscle damage and severe scarring. Delvalle was subsequently arrested, pled guilty to attempted assault in the first degree, and was sentenced to prison.

II. Procedural History

Matican, severely injured as a consequence of defendants' conduct, brought a § 1983 suit alleging, *inter alia*, that Schneider, Zimmerman, and Ordonez violated his Fourteenth Amendment substantive due process right to be free from bodily injury caused by arbitrary state conduct, in planning and pursuing the Sting in such a way as to make Matican's involvement apparent to Dealer, leading to Matican's injury. In addition, Matican alleges that the Defendants violated his substantive due process rights by securing his

cooperation in the Sting through false promises of security, and by failing to warn him after the arrest of Dealer's violent history and release on bail. Although his injuries were inflicted by Delvalle, a private actor, Matican contends that the defendants are liable under both exceptions to the general rule of no governmental liability for private violence: state actors creating or increasing the danger of the violence ("state-created danger"), *cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201 (1989) (implying state actors may have liability unless they "played no part in . . . creation [of dangers faced by victim of private violence], nor did . . . anything to render [the victim] any more vulnerable to them"),[2] and state actors' failure to protect a person in a special relationship with the state ("special relationship"), *id.* at 199-200 ("when the State take a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"). (Collectively, state-created danger and special relationship shall be referred to as the "*DeShaney* exceptions.") Matican's § 1983 claim against the City alleges deliberate indifference towards Matican's constitutional rights in failing to train police officers adequately in the protection of CIs. In addition, Matican asserted pendent claims of negligence under New York law against the Defendants. Federal jurisdiction over the § 1983 claims was predicated upon

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2. Although this statement in *DeShaney* was *dicta*, most federal circuit courts, including the Second Circuit, have recognized a state-created danger exception to the general rule of nonliability for privately inflicted violence. *See, e.g., Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006) (collecting cases).

28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3); federal jurisdiction over the pendent claims was based upon 28 U.S.C. § 1367.

Defendants moved for summary judgment on all of the § 1983 claims.[3] The District Court (per Frederic Block, J.) granted their motion in its entirety, and dismissed the pendent claims without prejudice. App. 18a. Matican appealed to the Second Circuit, which affirmed the District Court's decision (the "Second Circuit Decision"). The Second Circuit Decision found that the individual Defendants' conduct in planning and executing the Sting was sufficiently affirmative to qualify as a state-created danger that could give rise to governmental liability for privately inflicted violence, App. 13a, but noted the absence of a relationship between the police and Delvalle apart from the Sting itself, App. 13a n.7. Avoiding a resolution of the issue of whether this factor precludes a finding of a state-created danger, App. 13a n.7, the Second Circuit Decision affirmed the District Court on the ground that the police's conduct did not shock the conscience, App. 16a-17a.

The Second Circuit Decision implicitly interprets an earlier Second Circuit decision, *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007), as holding that whenever

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3. Matican cross-moved for partial summary judgment on his pendent claims, but the District Court declined to exercise jurisdiction over those claims in light of its decision on the § 1983 claims, and the pendent claims are not the subject of this appeal. However, in the event this Court grants *certiorari* in this case, Matican will seek to have his pendent claims reinstated in the event one or more of his § 1983 claims is reinstated.

governmental officials must consider any "serious competing obligations," their actions cannot shock the conscience absent intent to harm. *See* App. 15a-16a. The Second Circuit Decision expressly rejects a balancing test proposed by Matican, who argued for adopting the test enunciated in *Youngberg v. Romeo*, 457 U.S. 307 (1982), whereby "the liberty of the individual" is balanced against "the demands of an organized society," *id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).[4] *See* App. 15a. Instead, the court explains that *Lombardi* provides the standard, App. 15a-16a, describing the police's safety in carrying out the Sting as a "serious competing obligation" that militates against finding a substantive due process violation, App. 16a. In essence, the Second Circuit Decision adopts the *Lombardi* standard that under such circumstance, a substantive due process violation could exist only if the police had intended him harm. *See* App. 15a-17a.[5]

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4. Specifically, Matican asked that the following factors be considered in the balancing:

> (1) The degree of danger to plaintiff caused by defendant's actions or omissions;
>
> (2) The degree of danger to the general public in guarding against the risk to the plaintiff;
>
> (3) The burden imposed upon the defendant in guarding against the risk to plaintiff; and
>
> (4) Special circumstances, such as Schneider and Zimmerman's false assurances of Matican's safety.

5. Matican did not allege that the individual Defendants acted with intent to harm him. *See* App. 33a.

Matican timely moved for a rehearing before the Second Circuit panel and a rehearing *en banc*, which motions were denied. App. 42a. This timely Petition for Certiorari followed.

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeals Are Divided Over Whether Intent To Harm Is A Necessary Element Of A Substantive Due Process Claim Against State Executive Actors Who Face The Pull Of Competing Obligations In Non-Emergency Circumstances.

The Second Circuit Decision effectively holds that even absent exigent circumstances, unless state executive actors intend to harm, their conduct is not conscience-shocking if they are confronted with competing obligations and choose to protect themselves instead of private individuals whom they have placed in danger. The court justifies its approach with the explanation that because defendant officers were "obliged to protect their own safety as well as Matican's, their design of the Sting does not shock the conscience," App. 17a, reasoning which appears at odds with that of the Supreme Court, and is certainly contrary to the approach taken by other circuits.

The shock-the-conscience test was articulated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), which instructs that "in a due process challenge to executive action," liability requires that the state actor's conduct "shock the contemporary conscience," *id.* at 847 n.8. Whether conduct is conscience-shocking depends upon the degree of culpability of the defendant and

surrounding circumstances. While harm resulting from ordinary negligence is never sufficient to sustain such a due process claim, *id.* at 849, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level," *id.* Particular circumstances determine if conduct is conscience-shocking provided the level of culpability lies between ordinary negligence and intent, for example, deliberate indifference. This Court has never defined deliberate indifference in a substantive due process setting, although *Farmer v. Brennan*, 511 U.S. 825 (1994), defined it as criminal law, or subjective, recklessness, *i.e.*, knowledge and disregard of an excessive risk to safety, in the Eighth Amendment context, *id.* at 837, 839-40. Circuit courts have differed as to whether the same definition applies in the substantive due process context . *See Sanford v. Stiles*, 456 F.3d 298, 310 n.13 (3d Cir. 2006) (noting circuit split as to whether subjective or objective deliberate indifference standard applies in substantive due process cases).

In the emergency situation presented in *Lewis*, where injury resulted fr m a police officer's car colliding with a passenger on a motorcycle being pursued in a high-speed chase, the Court rejected the Ninth Circuit's imposition of a deliberate indifference standard for liability, *see id.* at 854. Recognizing liability in emergency circumstances only when the police act with "intent to harm suspects physically or to worsen their legal plight," *id.*, the Court analogized a high-speed chase situation to the prison riot that confronted the defendants in *Whitley v. Albers*, 475 U.S. 312 (1986), an Eighth Amendment case. *See Lewis*, 523 U.S. at 853 ("The

analogy [of analysis of conduct during a prison riot under the Eighth Amendment] to sudden police chases (under the Due Process Clause) would be hard to avoid"). *Lewis* contrasted these situations, where liability requires intent to harm, with the failure to address the serious medical needs of pretrial detainees, *id.* at 850-53, where substantive due process liability attaches upon a finding of deliberate indifference, *id.* at 850.

As justification for imposing an intent-to-harm standard, *Lewis* emphasized that state actors often need to make instant choices, *id.* at 853 ("police officers are often forced to make split second judgments – in circumstances that are tense, uncertain and rapidly evolving") (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)) (internal quotation marks omitted). In addition, *Lewis* noted that state actors may be forced to choose between competing obligations. *Id.* (an "officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders").

Lewis did not directly address whether both of these factors are prerequisites for imposing the intent-to-harm standard, as opposed to one or the other alone being sufficient, and did not provide whether, if there is no emergency, the intent-to-harm standard applies if the obligation that causes the government actor to engage in a course of conduct running contrary to an individual's liberty interest is less important than that liberty interest or invites a different course of action.

However, *Lewis* observed that in many custodial cases, state actors who had "the luxury" of "time to make unhurried judgments" could make decisions that were "*largely* uncomplicated by the pull of competing considerations" *Id.* (emphasis added). In so reasoning, *Lewis* hints that the "pull of competing obligations" is less of a factor when there is time to reflect. Where the "pressure" and "tens[ion]" that accompany the need to make an immediate decision in "rapidly evolving" circumstances are absent, the pull is "largely" rendered manageable, or eliminated altogether. Certainly, there is no competition between obligations where there is time to consider alternatives and to avoid any conscious disregard of the risks to private individuals.

Lewis's distinction between split-second and unhurried decisions has been decisive in most Circuits other than the Second. In holding that the presence of competing obligations is alone sufficient for the intent-to-harm standard to apply, the Second Circuit Decision diverges from caselaw of the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. That decision also varies from the Third Circuit, which has held that the existence of competing obligations requires a higher *mens rea* standard than that which would otherwise apply, but has reserved decision on whether that higher standard is one of deliberate indifference or intent to harm.

A. A Standard of Culpability Lower Than Intent Should Apply When the State Actor Has Time to Deliberate, Regardless of Whether Competing Obligations Exist: Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.

The Sixth, Seventh, Eighth, and Tenth Circuits have found that the inverse of *Lewis* applies, *i.e.*, when there are no exigent circumstances, the standard for liability *must be* deliberate indifference or recklessness rather than intent-to-harm. *See Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) (stating, "In situations wherein the implicated state, county, or municipal agent(s) are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action . . . , their actions will be deemed conscience-shocking if they were taken with 'deliberate indifference' towards the plaintiff's federally protected rights"); *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007) (stating, "when the circumstances permit public officials the opportunity for reasoned deliberation in their decisions, we shall find the official's conduct conscience shocking when it evinces a deliberate indifference to the rights of the individual"); *Wilson v. Lawrence County*, 260 F.3d 946, 956 (8th Cir. 2001) (holding that "in situations where state actors have the opportunity to deliberate various alternatives prior to selecting a course of conduct, such action violates due process if it is done recklessly")[6]; *Neal v. St. Louis County Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000) ("In situations where a state actor is afforded

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6. However, *Wilson* also considers whether there is a countervailing interest. *See id.* at 957.

a reasonable opportunity to deliberate various alternatives prior to electing a course of action, the chosen action will be deemed 'conscience shocking' if the action was taken with 'deliberate indifference'") (citing *Lewis*, 523 U.S. at 850-51);[7] *Perez v. United Gov't of Wyandotte County/Kansas City*, 432 F.3d 1163, 1166 (10th Cir. 2005) ("when a government official has enough time to engage in 'actual deliberation,' conduct that shows 'deliberate indifference' to a person's life or security will shock the conscience and thereby violate the Fourteenth Amendment"), *cert. denied*, 548 U.S. 905 (2006).

The Sixth Circuit, in *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002), applied a deliberate indifference standard in a situation in which the court expressly acknowledged that the defendant police officers "undoubtedly faced competing obligations" in

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7. In *Putnam v. Keller*, 332 F.3d 541 (8th Cir. 2003), the Eighth Circuit also found that a showing of deliberate indifference was sufficient to allege a substantive due process violation where the state actors had a reasonable opportunity to consider alternatives before acting, *id.* at 548. The court subsequently mentioned that it recognized that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." *Id.* (quoting *Lewis*, 523 U.S. at 850) (alteration in original) (internal quotation marks omitted). Given that *Putnam* found deliberate indifference based upon the defendants' opportunity to consider alternatives, the latter observation is, at best for defendants, *dicta*; it is not clear what purpose was served by the inclusion of that observation in the opinion. Consequently, *Wilson* and *Neal* are still good law in the Eighth Circuit. *Putnam* ultimately granted summary judgment to the defendants on the substantive due process claim on qualified immunity grounds. *Id.*

choosing how to act in a situation not requiring split-second decisions, *id.* at 511.[8] While none of the cases in the other circuits — *King*, *Wilson*, *Neal*, or *Perez* — expressly addresses the question of competing obligations, there is no suggestion in any of them that the deliberate indifference standard each applies would not also obtain in situations where competing obligations were present. Thus, the Sixth, Seventh, Eighth, and Tenth Circuits disagree with the Second Circuit's imposition of an intent to harm standard whenever competing obligations are present.

While the Ninth Circuit has not gone as far in announcing an express *per se* rule that culpability standard below that of intent to harm applies when the state actor has time to deliberate, it has implied as much by describing the time-to-deliberate factor as the "critical question" in setting the culpability standard. The same year *Lewis* was decided, the Ninth Circuit characterized *Lewis* as "describ[ing] the critical consideration [in determining the culpability standard for finding what executive actions "shock the conscience"] as whether the circumstances are such that 'actual deliberation is practical.'" *Moreland v. Las Vegas*

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8. In its decision earlier this month in *Hunt v. Sycamore Community School District Board of Education*, No. 07-4082, ___ F.3d ___, 2008 WL 4163222 (6th Cir. Sept. 11, 2008), the Sixth Circuit found that the existence of a "countervailing legitimate purpose" affects the determination of whether a state actor's conduct shocks the conscience. *Id.* at *9. However, it appears that such a factor is considered not in terms of whether the *mens rea* standard is one of intent to harm or deliberate indifference, but, rather, whether deliberate indifference, being the governing standard, may be found to exist. *See id.*

Metro. Police Dep't, 159 F.3d 365, 372 (9th Cir. 1998) (quoting *Lewis*, 523 U.S. at 851). *Moreland* also observed that that "each of the circuits that has interpreted and applied this aspect of the *Lewis* decision has recognized that *the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct.*" *Id.* at 373 (emphasis added). *Moreland* ultimately held that the intent standard applied where "it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others." *Id.* at 372; *see id.* at 373. While not expressly holding that a deliberate indifference standard would apply whenever the state actor had time to consider alternative actions, *Moreland* effectively held as such by implication. If the presence or absence of time to deliberate represented the "critical question," *id.* at 373, in setting the culpability requirement, and if, under *Lewis*, intent to harm was the required mental state when the state actor lacked time to deliberate, then deliberate indifference must be the standard when the state actor had time to deliberate; otherwise, the presence of time to deliberate would not be the "critical question." Like the Sixth, Seventh, Eighth, and Tenth Circuit cases discussed above, *Moreland* does not suggest that the presence of competing obligations would require an intent-to-harm standard when there is time to deliberate.

The Fifth Circuit also appears to have held by implication that a state actor who has time to deliberate is subject to a deliberate indifference, and not an intent

to harm, standard. In *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999), *cert. denied*, 530 U.S. 1274 (2000), the Fifth Circuit held that as a result of FBI agents conducting a sting operation having "made decisions which harmed the Plaintiffs after ample opportunity for cool reflection," "the due process clause protects the Plaintiffs from any harm that arose from the officers' deliberate indifference," *id.* at 592. However, the court also observed that the officers had "invested almost two years and thousands of man hours in developing the sting operation," *id.*, which extended period, well beyond an ephemeral opportunity to reflect, may have affected the court's outcome. As with the Sixth, Seventh, Eighth, Ninth, and Tenth Circuit cases discussed above, *Brown* does not suggest that the existence of competing obligations would warrant imposition of an intent-to-harm standard when the state actor has time to deliberate.

B. The Presence of Competing Obligations Increases the Culpability Required for Finding a Violation, But Not Necessarily to the Intent Level: Third Circuit.

The Third Circuit has found, "more culpability is required to shock the conscience . . . to the extent the responsibilities of the state actors require a judgment between competing, legitimate interests." *Schieber v. City of Philadelphia*, 320 F.3d 409, 419 (3d Cir. 2003). Insofar as *Schieber* found that the record before it in that particular case did not support a finding of deliberate indifference, the Third Circuit dismissed the action without determining whether a standard higher than that of deliberate indifference might apply. *Id.* at 421.

C. When a State-Created Danger Exists, and the State Actor Has Time to Deliberate, Deliberate Indifference Is the Standard of Culpability: D.C. Circuit.

The D.C. Circuit utilizes the deliberate indifference standard in substantive due process cases in "circumstances where the State has a heightened obligation toward the individual." *Fraternal Order of Police Dep't of Corrections Labor Comm. v. Williams*, 375 F.3d 1141, 1145-46 (D.C. Cir. 2004) (quoting *Butera v. Dist. of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001)) (internal quotation marks omitted). Such special circumstances include the *DeShaney* exceptions. *See id.* (special relationship); *Butera*, 235 F.3d at 652 (state-created danger, in situations when "actual deliberation is practical") (quoting *Lewis*, 523 U.S. at 851) (internal quotation marks omitted).[9]

Because the Second Circuit Decision involved both of the aforementioned special circumstances, if D.C. Circuit precedent were applied therein, the required *mens rea* would be deliberate indifference. Therefore, like the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and possibly Third, Circuits, the D.C. Circuit would not have required a showing of intent to harm in the case at bar.[10]

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9. *Williams* did not specifically hold whether, in an involuntary custody case, deliberation needed to be practical for the deliberate indifference standard to apply.

10. However, D.C. Circuit caselaw differs from that of those other circuits in that it uses a deliberate indifference standard only in cases in which there is a "heightened obligation toward the individual." Thus, in a case in which the state actor has time to deliberate but does not have a heightened obligation toward the victim, the actor is held to an intent-to-harm standard.

D. Intent to Harm Is the Required *Mens Rea* Whenever "Serious Competing Obligations" Are Present, Regardless of Whether the State Actor Has Time to Deliberate: Second Circuit.

The Second Circuit Decision, which expressly acknowledges that "the officers had ample opportunity to plan the sting in advance," App. 15a, nonetheless relies upon recent Second Circuit precedent that had suggested intent to harm might be required even in the presence of time to deliberate. *See* App. 15a (stating that in *Lombardi*, 485 F.3d at 85, the court had "held that, regardless of whether the situation was a time-sensitive emergency, plaintiffs' allegations of deliberate indifference did not shock the conscience").[11] Thus, the

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11. This reliance upon *Lombardi* is at best problematic. As the Second Circuit Decision noted, *Lombardi* did state that whether "[h]urried or unhurried, the defendants were subjected to the 'pull of competing obligations,'" *Lombardi*, 485 F.3d at 83 (quoting *Lewis*, 523 U.S. at 854), *quoted in* App. 15a. However, *Lombardi* was influenced by the fact that

> the [defendants'] decisions cannot [on the basis of their not being in the context of the rush of a car chase] be fairly characterized as 'unhurried' or leisured. The [report of the EPA's Office of the Inspector General] (relied upon by the complaint) shows that the defendants were required to make decisions using rapidly changing information about the ramifications of unprecedented events in coordination with multiple federal agencies and local agencies and governments.

Lombardi, 485 F.3d at 82. Only after the observation that the defendants' decisions were not "unhurried" did *Lombardi* then

(Cont'd)

Second Circuit stands in conflict with the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits, and possibly the Third, meriting this Court's review to resolve this Circuit split.

E. The Second Circuit's Standard Conflicts with *Lewis*'s Reasoning, if Not Its Holding.

Matican submits that the Second Circuit Decision holds substantive due process plaintiffs to a higher standard of proof than that contemplated by *Lewis*. By treating the existence of competing obligations as a sufficient basis to impose the intent standard, the Second Circuit disregards *Lewis*'s extended discussion of how prison officials have greater time to make decisions concerning the medical treatment of inmates than they do when deciding how to cope with a riot, or than police officers have in deciding whether to engage in a high-speed chase. The existence of competing obligations is not a factor to be viewed separately from the time-to-deliberate circumstance; rather, it is what creates the need for the deliberation in the first place. *See Lewis*, 523 U.S. at 851 ("As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical").

(Cont'd)

add its "[h]urried or unhurried" language. *See id.* at 83. Thus, the "[h]urried or unhurried" language, being in reference to a factual situation *Lombardi* itself found was not present, was *dicta*. However, as *certiorari* is often granted to resolve intercircuit, but not intracircuit, disputes, Matican focuses instead on the conflict between the Second Circuit Decision and other circuits' decisions.

At the very least, the "luxury" of time to deliberate is a factor that should be considered by the courts when evaluating a state actor's ability to address the pull of competing obligations without being deliberately indifferent to the interests of a private individual whom the actor has placed in danger. Though this Court's decision in *Youngberg* compels such judicial consideration, the Second Circuit did not factor into the mix the unhurried nature of the police's decision-making. This was error.

II. In Various Respects, There Are Differences Among The Supreme Court And The Second, Sixth, And Eighth Circuits As To Whether, And When, A Competing Obligation Requires Imposition Of An Intent To Harm Standard.

Lewis does not expressly set forth how, in substantive due process cases, a "competing obligation" is to be evaluated or when it is sufficiently important to merit imposition of an intent-to-harm standard. However, an intent to harm standard should not be imposed if: (1) the state's competing obligation arises from the state actor's own conduct, including situations when the state actor could have avoided risk to the individual's liberty interest in the first place by taking alternative action; or (2) the state's competing obligation is less important than its obligation to the private individual it has endangered, as when the likelihood of danger to the state actor is less than that to the private individual. In both of these respects, the Second Circuit Decision conflicts with decisions of this Court and/or of other circuits.

A. When the State's Competing Obligation Arises from the State Actor's Own Conduct: The Second Circuit Decision Conflicts with *Lewis*'s Reasoning.

In support of its holding as to *mens rea* in high-speed chases, *Lewis* notes that the petitioner police officer had not created the dangerous situation in the first place; instead, he

> was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause [the driver of the pursued vehicle's] high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes.

Id. at 855. Such language indicates a mental culpability requirement lower than that of intent to harm may apply when the state actor creates the underlying dangerous situation.

The instant case certainly involves police creation of the underlying circumstances that led to Matican's injury, by the police officers who conceived and conducted the Sting. Unlike the high-speed chase that confronted the police in *Lewis*, in the instant case the stage was set by the police themselves; yet the Second Circuit imposed an intent-to-harm standard

nonetheless. The Second Circuit Decision therefore arguably conflicts with *Lewis*.[12]

Moreover, the officers could have achieved their aims through use of alternative means that would not have given rise to a conflict between Matican's liberty interest and the competing obligation of their own safety. This was not a Catch-22 situation such that the officers would have violated someone's rights no matter what. *Compare Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, No. 07-4082, ___ F.3d ___, 2008 WL 4163222, at *10 (6th Cir. Sept. 11, 2008) (discussing judicial refusal to impose substantive due process liability for failure to perform an act that itself might have exposed the governmental actor to liability on another theory). Insofar the officers had to choose between their safety and Matican's, those competing obligations arose only because of the individual Defendants' failure to consider alternatives to the Sting. As concerned individual Defendants, the Second Circuit Decision weighed the threat of exposing Matican's identity through the use of excessive police presence in the Sting against the threat of physical harm to police officers in their conduct of the Sting. *See* App. 16a. The court thus apparently considered whether "great harm" could occur to Matican or to the officers under the assumption that the underlying circumstances of the Sting, *e.g.*, the date, time, place, and Matican's communications with Dealer in setting it up, would have

12. As discussed *infra*, the fact that the officers' own conduct led to the competing obligation also factors into whether the competing obligation outweighed Matican's liberty interest, which issue *Lewis* appeared to treat separately from that of whether the officers were responsible for the existence of the competing obligation.

been the same regardless of the individual Defendants' actions, and that the only variable was how much manpower the police would utilize in its execution of the Sting. This reasoning ignores the fact that *the officers themselves decided* whether, when, and where to carry out the Sting in the first place.[13] In viewing the issue so narrowly, the Second Circuit completely disregarded Matican's argument that the police, while using Matican's assistance to obtain information about Dealer (*e.g.*, his license plate number and other identifying information), could have planned the Sting so that it occurred at a time and place with which Dealer would not have associated Matican. Had the police done so, any risk to Matican would have been minimized, if not entirely eliminated. There would have been no trade-off, such as it was, between Matican's safety and that of the officers. While the officers could still consider the amount of force required to apprehend Dealer without jeopardizing their own safety, Matican's safety would have been protected regardless.

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13. Although the officers in *Lewis* also decided whether to engage in the pursuit, it is not clear that those officers would have been able to apprehend the motorcyclist at a later time, had they not pursued him immediately. Thus, the instant case differs from *Lewis* in that there was not necessarily a trade-off between deterring wrongdoing and avoiding danger to innocent civilians.

B. When the State's Competing Obligation Is Less Important Than Its Obligation to the Private Individual It Has Endangered: The Second Circuit Decision Conflicts with *Youngberg*'s Holding and Language in *Lewis*, and with Sixth and Eighth Circuit Precedent.

Supreme Court and Eighth Circuit caselaw suggest that the presence of a competing obligation justifies imposition of an intent-to-harm standard, if at all, only when the competing obligation is of importance at least equal to that of the liberty interest infringed by the state actor. The Sixth Circuit has declined to impose an intent-to-harm standard even when there is a competing obligation, instead applying a deliberate indifference standard within which context it considers the competing obligation as one of the factors in determining if the standard is satisfied. By contrast, the Second Circuit Decision imposes the intent-to-harm standard even if the competing obligation is less important than the liberty interest, provided the competing obligation is "serious." Given the circumstances in the instant case, Matican's liberty interest outweighed the competing obligation of police protection, and the result would have been different under the conflicting precedent.

In discussing why a higher threshold level of culpability should apply to actions taken in a high-speed chase than in providing medical care to detainees, *Lewis* noted that the State's responsibility for providing medical care to detainees "does not ordinarily clash with other *equally important* governmental responsibilities." *Id.* at 852 (quoting *Whitley v. Albers*, 457 U.S. 312, 230

(1986)) (internal quotation marks omitted) (emphasis added). This balancing of one interest against another is consistent with the balancing of "the liberty of the individual" against "the demands of an organized society," in determining whether a substantive due process right has been violated, as provided in *Youngberg*, 457 U.S. at 320 (quoting *Poe*, 367 U.S. at 542) (Harlan, J., dissenting)).[14] Varying the level of culpability necessary to find a substantive due process violation, directly with the ratio of the importance of the victim's liberty interest to the governmental actor's competing obligation, is a means of incorporating *Youngberg*'s balancing concept into *Lewis*'s shock-the-conscience test.

In an Eighth Circuit case, *Wilson v. Lawrence County*, 260 F.3d 946, the plaintiff alleged that after coercing him into confessing to commission of a murder,

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14. To be sure, *Youngberg* was a special relationship case, *see DeShaney*, 489 U.S. at 198-200, but once it has been shown that one of the *DeShaney* exceptions to state actors' immunity from liability for privately inflicted violence, inquiry is triggered as to whether a state actor has committed a constitutional tort. The reason this inquiry is triggered should not, in isolation from other factors, set the *mens rea* standard, instead becoming one of many considerations in determining culpability. Subject to this requirement in constitutional tort cases involving injury caused by a third person that there be a custodial relationship or a state-created danger, the *Youngberg* test remains good law. *See Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008) (applying *Youngberg* test); *Patten v. Nichols*, 274 F.3d 829, 842 n.5 (4th Cir. 2001) (stating *Youngberg* is still good law); *but see Hare v. City of Corinth*, 74 F.3d 633, 646-47 (5th Cir. 1996) (en banc) (questioning continued vitality of *Youngberg* in light of *DeShaney*).

police officers violated his substantive due process rights by failing to investigate leads that pointed to other suspects. *Id.* at 950. The court found that the defendants had adequate time to deliberate. *Id.* at 957. *Wilson* found that because "[t]here is no countervailing *equally important governmental interest* that would excuse the appellants from fulfilling their responsibility to investigate" such other leads given an involuntary confession and the absence of any reliable corroborating evidence, the standard for liability was one of recklessness. *Id.* (emphasis supplied).

In a case decided after the Second Circuit Decision, the Sixth Circuit found that when a governmental actor has time to deliberate before acting, the *mens rea* standard is one of deliberate indifference rather than intent to harm, but the existence of a "countervailing, legitimate governmental purpose" served by the actor's choice renders it unlikely that deliberate indifference will be found to exist. *See Hunt*, 2008 WL 4163222, at *9. *Hunt* held that as a general rule, when the government's countervailing purpose was a mandatory duty imposed by federal law or the Constitution, the government's action would not shock the conscience; otherwise, the government actor would be placed in a position of unavoidable liability. *Id.* at *10-11.[15]

The Second Circuit Decision conflicts with *Youngberg*, *Lewis*, *Wilson*, and *Hunt*. At bar, the Second Circuit considered only that the individual Defendants had "two serious competing obligations: Matican's safety

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15. *Hunt* relied in part on *Lombardi* in reaching this result. *See id.* at *10.

and their own." App. 16a. The court observed that the individual Defendants

> could reasonably have concluded that the arrest of a potentially violent drug dealer demanded the use of overwhelming force, even if that show of force might jeopardize the informant's identity in the future. We are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands.

App. 16a. Thus, the Second Circuit did not weigh the importance of the obligations — protecting their own safety, and protecting informants' safety — against one another to see if the former at least equaled the latter in gravity, as *Youngberg*, *Lewis*, or *Wilson* would dictate; it merely found the officers' interest in their safety automatically prevailed by virtue of its being "serious." Also, *Lewis*'s reasoning that no "substantial countervailing interest excuse[s] the State from making provision for the decent care and protection of those it locks up," *Lewis*, 523 U.S. at 851, thus justifying a deliberate indifference standard in a case involving that issue, is inconsistent with the Second Circuit Decision, since prison officials could obviously conserve scarce resources by not providing medical treatment to inmates, and conservation of resources could be considered a "serious competing obligation."

Matican submits that had the Second Circuit balanced Matican's liberty interest against the individual defendant officers' obligation to protect themselves, the former would have prevailed, requiring analysis of Matican's substantive due process claims under a culpability standard lower than that of intent to harm. This is because there was a significantly greater probability that Dealer would (1) conclude from the manner in which the Sting was conducted that Matican had informed upon him, and (2) assault Matican in retaliation, than that a more low-key sting operation, involving one police car with one or two officers pulling Dealer over on a traffic stop, would result in injury to the officer or officers. The officers could have reduced the danger to themselves while potentially improving the objectives of law enforcement, as by learning Dealer's identity, engaging in surveillance, and arresting him when he was vulnerable, possibly ascertaining his suppliers in the process.[16]

In an attempt to distinguish the instant case from *Butera*, where an informant whom the defendant officers sent into an undercover drug purchase was beaten to death, the Second Circuit Decision refers to the circumstance that the *Butera* officers were "monitoring from the safety of their cars, and thus would have incurred no risk had they fitted the informant with wires or agreed in advance on danger signals." App. 16a (citing *Butera*, 235 F.3d at 642, 644) (citation omitted). However, even if the *Butera* informant had worn a wire, the

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16. The Sting should be considered a failure for many reasons, including the failure to identify or apprehend Dealer's superiors.

defendant officers would have had to leave their cars and confront his assailants to protect the informant, thereby incurring a risk of physical injury. By the Second Circuit's logic, the officers in *Butera* would not have been liable even if they had wired the informant, known he was being beaten to death, and taken no action, because actually protecting him would have placed them at risk. The Second Circuit's reasoning leads to such absurd results.

To be certain, the Second Circuit Decision expresses a reticence to second-guess police decision making, but this argument could be used to insulate from scrutiny virtually any action taken by government. In any event, Matican does not ask the Court to "dictate" how police should protect themselves; he only requests the right to present the trier of fact with evidence upon which the jurors can, provided they believe that evidence supports this result, impose liability based on their collective exercise of common sense in determining that police had equal or superior alternatives to the Sting, yet were deliberately indifferent to a private individual whom they affirmatively placed in danger.

III. The Confidential Informant Has A Special Relationship With Police.

The Second Circuit Decision also rejects the argument that a confidential informant had a special relationship with police. App. 9a-10a. Citing other circuits, and rejecting the reasoning of *G-69 v. Degnan*, 745 F. Supp. 254 (D.N.J. 1990), the Second Circuit reasons, in essence, that only when there is a custodial relationship is the claimant in a civil rights case rendered

so helpless that a state duty arises to protect a private individual from private violence. That is an oversimplification. No less than a prison inmate or a ward of the state, a confidential informant relies upon police to protect the informant's identity and safety.[17]

Matican was lulled into a false sense of security by police, and was, in relation to the limited issue of retaliation by Delvalle, rendered as helpless as an inmate because Matican lacked knowledge of the danger of private violence to him. Matican's helplessness was the product of police misrepresentations. He had relied upon their skills in planning and executing the Sting in a way that would secure his safety. The police officers undoubtedly knew that they would be imperiling Matican, while Matican, with no expertise in this matter, would have no such awareness. Matican's helplessness, brought about by his beliefs as cultivated by the police, is what is at issue here. As *G-69* recognizes, the inability to protect oneself is not exclusive to situations where the claimant is in custody.

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17. Although it is Matican's position that this issue is moot because there was a state-created danger here and the mental element of a deliberate indifference has been met, Matican points out that there are alternative grounds for granting this petition.

IV. The Second Circuit Decision Undermines Important Public Policies.

Police officers place themselves at risk whenever they protect a person from physical harm. By the Second Circuit Decision's reasoning, so long as the dangers to which police officers expose private individuals through their deliberate actions (but without intent to harm) are so serious that ameliorating them would place the police at risk of physical harm, the officers could never be liable for a substantive due process violation for failure to protect such individuals, because they could always cite their own self-protection as a competing obligation. To use the hypothetical situation contemplated in *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982), a police officer could throw someone into a snake pit (without intent to harm the person), then refuse to rescue the victim on the grounds that the officer could be bitten were he to lend assistance. The Second Circuit Decision effectively allows police officers to place private individuals in danger without intent to harm them, promise them protection, renege on that promise, then cite their own safety as a reason for such reneging. Such is not good public policy.

The motto of the New York City Police Department is *fidelis ad mortem*, or "Faithful till Death." The Second Circuit Decision provides a tragically ironic interpretation of this expression of purpose by making the police themselves, rather than the public, the object of the "Faith[]," and belies the implication in "till Death" of police prioritization of civilian lives above their own. Certainly it was not the intent of Congress, in enacting § 1983, to elevate government actors' interests ahead

of the liberty interests of private individuals such actors place in danger. Public cynicism about the functioning of government is fueled by court decisions that insulate government actors from liability for misconduct that render lofty government assurances of duty and service absurdities. Matican does not ask this Court to depart from the spirit or intent of § 1983, but rather requests that when adding judicial gloss, the Court, consistent with congressional purpose, interpret § 1983 in ways that do not undercut public confidence in government. He advocates that this Court strip away the plaque that the Second Circuit has placed upon constitutional tort cases that will, if followed, undercut public confidence in government by protecting those responsible for violating the constitution in an unconscionable way.

As a practical matter, a denial of review here would insulate police officers from scrutiny whenever they place their own safety above those of private individuals whom they have placed in danger. In and of itself, this decision is extremely damaging to government credibility, to say nothing of the constitutional implications that are discussed above. Where law enforcement agents, with all their expertise and resources, resort to false assurances and the execution of plans which injure private citizens, while keeping themselves safe, they have engaged in behavior sufficient to shock the conscience. *See Butera*, 235 F.3d at 643-44 (finding issue of fact as to whether officers' conduct shocked the conscience); *see also Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065 (9th Cir. 2006) (finding issue of fact as to whether officer's conduct constituted deliberate indifference); *Monfils v. Taylor*, 165 F.3d 511, 514, 516-17 (7th Cir. 1998) (upholding jury

finding that officer created a danger, without specifying required mental culpability).

The Second Circuit Decision is driven by the assumption that by imposing constitutional tort liability upon police officers, courts would be interfering in a negative way with such officers' decision making, even when those decisions are made with deliberate indifference in a non-emergency situation, and the pull of competing obligations is tainted by the officers' creation of the danger to begin with. However, the Second Circuit should have considered the positive effects that imposing liability would have on discouraging government abuse. There is no reason to suppose that government actors will act more responsibly because the judiciary confers immunity upon them under § 1983, despite their deliberate indifference; on the contrary, such immunity only discourages the worst in government. The primary concern of the courts should be the restraint of government misconduct, not the insulation from liability of government actors who disregard the rights of private individuals. Matican was lulled into a false sense of security by police officers' misrepresentation concerning his safety and he was exposed to a danger that the police have themselves created. This circumstance was then followed by police officers placing their safety above that of Matican.

Under these circumstances, courts should be concerned, not exclusively with the safety of police who engage in misconduct, but also with the integrity of government itself. As James Madison observed, "public opinion sets balance to every government, and is the

real sovereign in every free one." [18] The electorate must have confidence in government actors, and courts hardly advance government credibility when immunizing public officials from constitutional tort liability despite their deliberate indifference that places their interests above those of the public they are charged to protect.

This Court has recognized that strong public policy reasons underlie robust enforcement of § 1983 in civil cases brought against wayward law enforcement officers. In *Hudson v. Michican*, 547 U.S. 586 (2006), the Court observed, in holding that violation of a "knock-and-announce" rule applicable under the Fourteenth Amendment did not require suppression of evidence, that constitutional safeguards were available for unconstitutional conduct in the form of § 1983 claims. *Id.* at 596-98. Emasculating § 1983 would be contrary to this function of § 1983 as a deterrent to unconstitutional conduct.

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18. James Madison, *Public Opinion*, National Gazette, Dec. 19, 1791, *in* 14 Papers of Madison, 170 (Matican A. Rutland et al. Editions 1977).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED APRIL 23, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term 2007

Argued: October 22, 2007 Decided: April 23, 2008

Docket No. 06-1983-cv

ROBERT MATICAN,

Plaintiff-Appellant,

- against -

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ, and CHRIS ZIMMERMAN,

Defendants-Appellees.

Before: FEINBERG, WINTER, and STRAUB, Circuit Judges.

FEINBERG, Circuit Judge:

Plaintiff-appellant Robert Matican participated in a sting to help officers of the New York Police Department ("NYPD") arrest a suspected drug dealer: Matican set up a drug buy, and the police descended on the dealer in force when he arrived about an hour later.

After the dealer was released on bail, he assaulted plaintiff Matican with a box cutter, injuring him severely. Matican sued the City of New York ("City") and individual NYPD officers—Captain Julio C. Ordonez, Lieutenant John Schneider, and Sergeant Chris Zimmerman (collectively, "the officers")—arguing that the way they conducted the sting and their failure to alert Matican to the dealer's release gave away Matican's identity and left him in peril. He asserted claims for damages under 42 U.S.C. § 1983 and New York state law. By memorandum and order dated March 28, 2006, the United States District Court for the Eastern District of New York (Block, J.) granted defendants-appellees' motion for summary judgment on the § 1983 claims and declined to exercise supplemental jurisdiction over the state-law claims. For the reasons stated below, we affirm the judgment of the district court.

I. BACKGROUND

For purposes of Matican's appeal from a grant of summary judgment, we take his allegations as true and draw all reasonable inferences in his favor. *Jenkins v. City of New York*, 478 F.3d 76, 85 n. 4 (2d Cir.2007).

On the evening of September 18, 2001, Matican purchased crack cocaine from a drug dealer he knew as "Mike," who had supplied him with drugs on a number of prior occasions. Undercover NYPD officers then arrested Matican and took him to a precinct house in Bayside, Queens. While Matican was in a holding cell,

defendant Zimmerman approached him and offered to make the arrest "go away" if Matican would agree to help the officers arrest Mike. Matican was interested in the offer but expressed concern for his safety if Mike made bail. Matican testified that Zimmerman responded, "Don't worry, Robert, we will look after you. We will protect you." Matican agreed to cooperate based on Zimmerman's promise.

According to Matican, Zimmerman then instructed Matican to arrange a drug buy with Mike the following evening in front of the Bayside Jewish Center, a frequent location for prior drug transactions between Matican and Mike. The police would be waiting with two cars and four officers in each car. When Mike executed his customary illegal U-turn in front of the Jewish Center, Matican would identify the car from the safety of a darkened athletic field across the street, and the police would pull over Mike as if for a routine traffic stop. Defendant Schneider asked Matican what quantity of drugs Mike would be carrying; when Matican replied that Mike would have 20 or 30 bags of crack, Schneider replied, "[I]f he has that many bags, he is not going to even make bail." After the plan was formulated, the officers released Matican with a desk appearance ticket.

The following evening, Matican met the officers at the prearranged location and paged Mike to arrange a large drug buy. Mike arrived and Matican identified his car, as planned. According to Matican, the officers then cut Mike off with two police vehicles, pulled him from the driver's seat, and pinned him against his car. The

officers searched Mike's person and car, discovered drugs, and arrested him. Matican remained hidden and unseen in the darkened field.

Mike, whose real name was Steven Delvalle, was found to be in possession of 16 bags of crack cocaine, two bags of marijuana, and about $2,000 in cash. Delvalle was charged with two counts of criminal possession of a controlled substance, as well as various moving violations. A criminal check performed at the precinct revealed that Delvalle had six prior arrests, including arrests for possession of a handgun and assault with a box cutter. On September 28, 2001, Delvalle was released on bail. Matican was not informed of Delvalle's arrest history, his release, or his real name, and he alleges that had he known these facts, he would have moved to California to live with his brother.

Matican never contacted Delvalle again after the sting operation. He acknowledges that he discussed his participation in the sting with his parents and a close friend, and that at least one other person knew about his role. On December 8, 2001, Delvalle approached Matican on a street in Queens. Delvalle said, "You ratted me. Why did you rat me?" He slashed Matican's face twice with a box cutter, then fled. Delvalle was arrested several days later; he eventually pled guilty to one count of attempted assault and one count of attempted criminal possession of a controlled substance, and was sentenced to eight years in prison.

Appendix A

Matican filed his suit in the Eastern District in November 2002, stating causes of action under 42 U.S.C. § 1983 and New York common law. Defendants moved for summary judgment on all claims. The district court granted summary judgment on the § 1983 claims and declined to exercise supplemental jurisdiction over the state claims. *Matican v. City of New York*, 424 F.Supp.2d 497 (E.D.N.Y.2006). This appeal followed.

II. DISCUSSION

We review de novo the district court's grant of summary judgment, construing the evidence in the light most favorable to Matican, the nonmoving party, and drawing all inferences and resolving all ambiguities in his favor. *Doro v. Sheet Metal Workers' Int'l Ass'n*, 498 F.3d 152, 155 (2d Cir.2007). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Matican asserted the following causes of action: (1) a claim under 42 U.S.C. § 1983 that the officers violated his right to substantive due process under the Fourteenth Amendment by failing to protect him from Delvalle's assault; (2) a § 1983 claim against the City for failing to train its officers to protect confidential informants from harm; and (3) claims sounding in state law against all defendants asserting that the officers behaved negligently, and that the City is vicariously

liable for their actions under the doctrine of respondeat superior.

The first two claims depend on a single threshold question: did the officers' actions violate Matican's constitutional rights? If they did not, then the City cannot be liable to Matican under § 1983, regardless of whether the officers acted pursuant to a municipal policy or custom. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam). Furthermore, if Matican has no valid claim under § 1983 against any defendant, it is within the district court's discretion to decline to exercise supplemental jurisdiction over the pendent state-law claims. *See Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir.2006) (citing 28 U.S.C. § 1367(c)(3)).[1] We therefore begin with the threshold question of whether the officers' conduct infringed Matican's constitutional rights.

Among the liberties protected by the Due Process Clause of the Fourteenth Amendment is "a right to be free from . . . unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). But in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Supreme

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1. We must also determine the existence of a constitutional violation before we may consider the officers' defense of qualified immunity. *Sira v. Morton*, 380 F.3d 57, 68-69 (2d Cir. 2004) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

Court observed that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195, 109 S.Ct. 998. As a result, the Court held that the Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196, 109 S.Ct. 998.

We have recognized two exceptions to this general principle, rooted in the Supreme Court's analysis in *DeShaney.* First, the state or its agents may owe a constitutional obligation to the victim of private violence if the state had a "special relationship" with the victim. *See Ying Jing Gan v. City of New York*, 996 F.2d 522, 533 (2d Cir.1993) (citing *DeShaney*, 489 U.S. at 198, 109 S.Ct. 998). Second, the state may owe such an obligation if its agents "in some way had assisted in creating or increasing the danger to the victim." *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir.1993) (citing *DeShaney*, 489 U.S. at 201, 203, 109 S.Ct. 998), *overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

Even if Matican's claim falls within one of these two exceptions, and the officers' behavior violated a constitutional obligation, Matican faces a further hurdle: he must show that the officers' behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of*

Sacramento v. Lewis, 523 U.S. 833, 848 n. 8, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). This requirement screens out all but the most significant constitutional violations, "lest the Constitution be demoted to . . . a font of tort law." *Id.*; *see Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

We consider (1) whether Matican's claims fall within either of the two *DeShaney* exceptions and (2) whether the officers' behavior can be said to shock the contemporary conscience.

A. Special relationship exception.

The special relationship exception grows from the *DeShaney* Court's observation that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 198, 109 S.Ct. 998.[2] The Court gave, as examples, the obligations of states to incarcerated prisoners and involuntarily committed mental patients, and concluded that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."

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2. We recognized this principle before *DeShaney*, in *Doe v. New York City Department of Social Services*, 649 F.2d 134, 141 (2d Cir.1981).

Id. at 199-200, 109 S.Ct. 998.[3] Under these limited circumstances, the state may owe the incarcerated person an affirmative duty to protect against harms to his liberties inflicted by third parties. But the duty arises solely from "the State's affirmative act of restraining the individual's freedom to act on his own behalf [ ] through incarceration, institutionalization, or other similar restraint of personal liberty." *Id.* at 200, 109 S.Ct. 998.

Our own opinions have also focused on involuntary custody as the linchpin of any special relationship exception. *See Lombardi v. Whitman*, 485 F.3d 73, 79 n. 3 (2d Cir.2007) ("Special relationships arise ordinarily if a government actor has assumed an obligation to protect an individual by restricting the individual's freedom in some manner, as by imprisonment."); *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 824 (2d Cir.1996) (holding that plaintiffs' claim did not fall within *DeShaney* exception because "the plaintiffs here . . . are not involuntarily institutionalized"); *see also Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir.1981) (holding that state is liable under Due Process Clause for abuse suffered by child in foster care, and emphasizing custodial nature of foster care placement).

The relationship between defendants and Matican does not resemble those that have been found to lie within the bounds of the special relationship exception. Matican

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3. The Court noted that the situation of a child placed in foster care might be sufficiently analogous to those of prisoners or mental patients to trigger the exception, but it did not decide the question. *Id.* at 201 n. 9, 109 S.Ct. 998.

freely agreed to serve as a confidential informant in exchange for more lenient treatment. He was not in custody at the time of the sting or of Delvalle's assault. The state did not "render[ ] him unable to care for himself," *DeShaney*, 489 U.S. at 200, 109 S.Ct. 998; after all, Matican argues that, had defendants warned him of Delvalle's release, he would have moved to California to live with his brother. That he was in custody when he agreed to become a confidential informant is of no moment: he does not allege that he was coerced, and his former incarceration did not exacerbate his injury. *See id.* at 201, 109 S.Ct. 998 ("That the State once took temporary custody of [petitioner] does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.").

We therefore join several of our sister circuits in holding that a noncustodial relationship between a confidential informant and police, absent more, is not a special relationship. *Accord Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir.2005); *Dykema v. Skoumal*, 261 F.3d 701, 706 (7th Cir.2001); *Butera v. District of Columbia*, 235 F.3d 637, 648 (D.C.Cir.2001); *Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir.1998).[4]

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4. Matican encourages us to adopt the reasoning of *G-69 v. Degnan*, 745 F.Supp. 254 (D.N.J.1990), which held that a special relationship exists between the state and a confidential informant whose safety depends on confidentiality. *Id.* at 265. But *G-69* fails to distinguish between the special relationship

(Cont'd)

Appendix A

B. State-created danger exception.

Like the special relationship exception, the state-created danger exception arises from the Court's analysis in *DeShaney.*[5] After explaining that no special relationship existed between the state and petitioner, the Court further noted that, "[w]hile the State may have been aware of the dangers that [petitioner] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998. The Court emphasized that government officers had done nothing worse than failing to take action even though suspicious circumstances may have counseled an active role. *Id.* at 203, 109 S.Ct. 998. These statements led us to conclude that, by negative implication, the state does infringe a victim's due process rights when its officers assist in creating or increasing the danger that the victim faced at the hands of a third party. *Dwares*, 985 F.2d at 99.

(Cont'd)

and state-created danger exceptions, a distinction that may not have been obvious in *DeShaney*'s immediate aftermath. *See id.* (finding special relationship because plaintiff's service to state "increased by a corresponding proportion the risk to his life"). As such, we do not find the decision to be particularly persuasive, and choose instead to follow the more recent analysis from our sister circuits.

5. The doctrine had been recognized in some circuits prior to *DeShaney. See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n. 1 (9th Cir.2006) (collecting cases).

In applying the state-created danger principle, "we have sought to tread a fine line between conduct that is 'passive' " (and therefore outside the exception) "and that which is 'affirmative' " (and therefore covered by the exception). *Pena v. DePrisco*, 432 F.3d 98, 109 (2d Cir.2005). Thus, we have found state-created dangers (or denied summary judgment where state-created danger theories were alleged) where police officers told skinheads that they would not prevent them from beating up protesters in a park, *Dwares*, 985 F.2d at 99; where police officers gave a handgun to a retired officer who then shot a fleeing robber, *Hemphill v. Schott*, 141 F.3d 412, 419 (2d Cir.1998); where a prison guard told inmates that it was "open season" on a prisoner, and the inmates beat up the prisoner, *Snider v. Dylag*, 188 F.3d 51, 55 (2d Cir.1999); and where police officials encouraged an off-duty colleague to drink excessively, after which he killed three pedestrians in a car accident, *Pena*, 432 F.3d at 110-11. By contrast, we held that no state-created danger existed where a police officer failed to intervene to prevent a colleague from shooting someone during an altercation. *Pitchell v. Callan*, 13 F.3d 545, 549 (2d Cir.1994).[6]

As the district court recognized, Matican's allegation that the officers failed to learn about, or inform him of, Delvalle's violent criminal history or his release on bail

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6. We declined to decide whether a state-created danger existed where, after the terrorist attacks of September 11, 2001, federal officials informed rescue workers that the air near the World Trade Center site was safe to breathe, causing the workers to forego protective gear. *Lombardi*, 485 F.3d at 81.

fall on the passive side of the line. "Under *DeShaney*, allegations that the defendant officers merely stood by and did nothing are insufficient to state a constitutional violation." *Pena*, 432 F.3d at 110 (internal quotation marks omitted); *see also Lombardi*, 485 F.3d at 79 ("It is not enough to allege that a government actor failed to protect an individual from a known danger of bodily harm or failed to warn the individual of that danger."). This is so notwithstanding Matican's assertion that the officers promised to protect him. *See DeShaney*, 489 U.S. at 200, 109 S.Ct. 998 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him. . . .").

By contrast, Matican's allegation that the officers planned the sting in a manner that would lead Delvalle to learn about Matican's involvement is sufficiently affirmative to qualify as a state-created danger. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir.2006) (finding that, where police officer informed assailant that victim had filed report against him, and assailant then shot victim, officer "affirmatively created an actual, particularized danger" to victim).[7]

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7. The defendant law enforcement officers in *Dwares*, *Hemphill*, *Snider*, and *Pena* all had personal relationships with the third-party assailants, and they either actively facilitated the assaults or personally communicated that assaults would go unpunished. Here, by contrast, the officers' conduct might have indirectly alerted Delvalle to Matican's identity, but the officers had no personal relationship with Delvalle other than

(Cont'd)

C. Shocking the conscience.

Until recently, Supreme Court and Second Circuit precedent gave little objective guidance as to whether a particular state action does or does not shock the contemporary conscience. In *Lewis*, the Supreme Court noted one set of parameters: negligently inflicted harm "is categorically beneath the threshold of constitutional due process," 523 U.S. at 849, 118 S.Ct. 1708 (citing *Daniels v. Williams*, 474 U.S. 327, 328, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)), whereas the intentional infliction of injury is the conduct "most likely to rise to the conscience-shocking level," *id.* As for conduct between these poles, the Court held only that harm inflicted

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the arrest itself. We have thus far found state-created dangers only where there is such a relationship. *See Pena*, 432 F.3d at 109 ("Our distinction between these categories of cases suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant."); *see also Dwares*, 985 F.2d at 99 (describing officers' liability in terms of "aid[ing] and abett[ing]"). However, other circuits have found state-created dangers where state officials had no relationship with the individual causing harm, *e.g.*, *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir.1989), or where the victim was not harmed by an individual at all, *e.g.*, *Kneipp ex rel. Cusack v. Tedder*, 95 F.3d 1199, 1209 (3d Cir.1996). Because the officers' affirmative conduct did not shock the conscience (as explained below), we need not decide whether the state-created danger exception is limited to cases where state officials had a direct relationship with the third party who caused injury.

recklessly or with deliberate indifference does not shock the conscience in the context of a time-sensitive emergency, such as a high-speed chase. *Id.* at 853-54, 118 S.Ct. 1708. Here, though, the officers had ample opportunity to plan the sting in advance. Matican argues that the district court erred in holding that the officers did not act with deliberate indifference. He proposes a balancing test to help factfinders determine when the conscience is shocked by reckless or deliberately indifferent state action that creates or increases a danger.

We need not consider Matican's proposed test, because this court's decision last year in *Lombardi* provides sufficient guidance to resolve this issue. In that case, we considered the claims of rescue and cleanup workers at the World Trade Center site following the 9/11 attacks. The workers in that case alleged that the defendants, federal environmental and workplace-safety officials, issued intentionally false press releases stating that the air in Lower Manhattan was safe to breathe, and that in reliance on those statements, the workers did not use protective gear. *Lombardi*, 485 F.3d at 75. We held that, regardless of whether the situation was a time-sensitive emergency, plaintiffs' allegations of deliberate indifference did not shock the conscience. *Id.* at 85. "Hurried or unhurried, the defendants were subjected to the 'pull of competing obligations.' " *Id.* at 83 (quoting *Lewis*, 523 U.S. at 834, 118 S.Ct. 1708). reasoned that those competing obligations counseled against broad constitutional liability for the government officials, whose decisionmaking might be inhibited by

the threat of lawsuits. *Id.* at 84. We concluded that "[w]hen great harm is likely to befall someone no matter what a government official does, the allocation of risk may be a burden on the conscience of the one who must make such decisions, but does not shock the contemporary conscience." *Id.* at 85.

The same considerations lead us to conclude that Matican's allegations of affirmative conduct by the officers, even if true, do not shock the contemporary conscience. In designing the sting, the officers here had two serious competing obligations: Matican's safety and their own. They could reasonably have concluded that the arrest of a potentially violent drug dealer demanded the use of overwhelming force, even if that show of force might jeopardize the informant's identity in the future. We are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands.

As we explained in *Lombardi*, the defendants in our prior state-created danger cases were not subject to "the pull of competing obligations." *See id.* at 83 (discussing *Pena* and *Dwares*). *Butera v. District of Columbia*, 235 F.3d 637 (D.C.Cir.2001), which Matican cites, is distinguishable for the same reason: the officers in that case sent an informant into an undercover drug buy while monitoring from the safety of their cars, *id.* at 642, and thus would have incurred no risk had they fitted the informant with wires or agreed in advance on danger signals, *id.* at 644.

Because the officers were obliged to protect their own safety as well as Matican's, their design of the sting in this case does not shock the conscience.[8] Matican therefore suffered no violation of his rights under the Due Process Clause.

III. CONCLUSION

We find that no constitutional violation occurred. We see no need to consider whether the officers enjoyed the benefit of qualified immunity, or whether Matican had a claim against the City for a practice or custom of failing to protect confidential informants. Furthermore, because Matican has no valid federal claims, the district court did not exceed its allowable discretion in declining to exercise jurisdiction over his state claims. 28 U.S.C. § 1367(c). We have considered all of Matican's other arguments for reversal of summary judgment and find them to be without merit.

Judgment affirmed.

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8. We need not resolve the vexing questions raised by defendants about the proximate cause of Matican's injuries.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 28, 2006

UNITED STATES DISTRICT COURT
E.D. NEW YORK

No. 02-CV-5805 (FB) (KAM).

ROBERT MATICAN,

Plaintiff,

v.

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ, and CHRIS ZIMMERMAN,

Defendants.

March 28, 2006.

MEMORANDUM AND ORDER

BLOCK, Senior District Judge.

Robert Matican ("Matican") sues the City of New York ("City") and three members of the New York City Police Department ("NYPD"): Captain Julio C. Ordonez ("Ordonez"), Lieutenant John Schneider ("Schneider") and Sergeant Chris Zimmerman ("Zimmerman") (collectively, "the officers"). Asserting claims under

42 U.S.C. § 1983 and New York common law, he seeks to hold defendants liable for damages suffered when he was assaulted by a private citizen.

Pursuant to Federal Rule of Civil Procedure 56, all defendants move for summary judgment on all claims; in addition, Matican cross-moves for summary judgment on his state-law claim. For the following reasons, the Court grants defendants' motion as to the § 1983 claims and declines to exercise jurisdiction over the state-law claim.

BACKGROUND

"When considering a motion for summary judgment, a court must construe the evidence in the light most favorable to the nonmoving party, drawing all inferences in that party's favor." *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir.2005). The following facts are either undisputed or, if disputed, taken in the light most favorable to Matican:

> On September 18, 2001, Matican was arrested for possession of crack cocaine; he claims that while he was awaiting processing in a holding cell, Zimmerman approached him and said, "Robert, we can help you with this. We can make this arrest go away." Matican Dep. at 92. When Matican asked what he had to do, Zimmerman told him he wanted to set up Matican's dealer (whom Matican knew only as "Mike"). Matican then asked, "If I help you

> and he [i.e., "Mike"] makes bail and he comes after me, will you protect me?" and Zimmerman responded, "Don't worry, Robert, we will look after you. We will protect you." *Id.* at 93. The defendants contest this version of events and claim that Matican volunteered to help Zimmerman and other officers apprehend "Mike" in exchange for favorable treatment from the district attorney's office.

Although the parties dispute who came up with the plan to apprehend "Mike" and when it was formulated, they do not question the plan's existence. Matican claims that one of the officers—perhaps Schneider—suggested arresting both "Mike" and Matican after a face-to-face sale. Matican admits he did not voice any objection to that plan, but attests that "[a]nother cop said, 'Hey, why don't we just let [Matican] point ["Mike"] out and keep him out of it,' " *id.;* Matican "liked that plan better." *Id.* The officers therefore decided that Matican would be kept out of sight during the operation.

Matican told the officers that he usually bought drugs from "Mike" near the Bayside Jewish Center at 204th Street and 32nd Avenue in Queens, and that "Mike" normally made an illegal u-turn arriving at that location. Based on this information, Matican and the officers agreed that Matican would page "Mike," arrange a buy, and hide at a nearby athletic field with Schneider. Matican would then identify "Mike" when he arrived, whereupon Schneider would radio other officers,

including Ordonez, who would stop "Mike" and use the illegal u-turn as a pretext for searching his car.

While discussing the plan, Zimmerman asked Matican, "[H]ow much drugs do you think ['Mike'] will have on him?" Matican Dep. at 109. When Matican said that he believed "Mike" would have "[t]wenty, thirty bags of crack," Zimmerman replied, "If he has that much drugs on him, he is not going to make bail." *Id.*

The officers opened a confidential-informant ("CI") file for Matican; the contents of the file are unknown, as defendants have been unable to locate it.[1] Defendants do not dispute, however, that Matican was given CI status. He was given a desk-appearance ticket and released early on the morning of September 19, 2001.

Later that day, Matican called Zimmerman three times to see if the sting operation was still on. Zimmerman confirmed that it was and, with Schneider and Ordonez, put the prearranged plan in motion.

Matican paged "Mike" and arranged a buy; the meeting was scheduled for the same day—September 19—at 8:00 p.m. and at the usual location. Matican and Schnieder then hid at the nearby athletic field, which was unlit. "Mike" did not arrive until almost an hour after Matican paged him. Schneider claims that, during

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1. Matican seeks an inference in his favor because of the lost file. He does not specify, however, what information allegedly in the file would support his claims.

this interval, he (Schneider) suggested discontinuing the operation, but that Matican wished to proceed; Matican denies this.

"Mike" finally arrived and made his usual illegal u-turn, at which time Matican identified him; Schneider than radioed the other officers. Ordonez and at least four other police officers converged on "Mike's" car in at least three cars; some of the officers were in street clothes and some of the cars were unmarked. According to Edward Mamet ("Mamet"), a retired NYPD officer and "police practices" expert, the "number of officers and police vehicles used was not in accordance with what would be generally used to conduct a traffic stop." Mamet Decl. ¶ 8.[2]

During the subsequent search, "Mike" was found to be in possession of marijuana; he was arrested and taken to the precinct for processing. At the precinct, "Mike," by this time identified as Steven Delvalle ("Delvalle"), was also found to be in possession of crack cocaine. An inventory of his possessions prepared by Officer Kevin Shanahan (who is not a defendant in this case) recites that, in addition to "2 ziplocks of Marijuana," Delvalle was "in possession of 16 ziplocks of crack/cocaine and was attempting to sell them." Decl. of Michael A. Haskel, Ex. V.

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2. The defendants argue that Mamet's declaration should be disregarded because he was not disclosed as an expert under Federal Rule of Procedure 26(a)(2). It is not necessary to address this issue as the defendants are entitled to summary judgment whether or not the affidavit is considered.

Appendix B

A criminal check at the precinct revealed that Delvalle had several prior arrests, including one for criminal possession of a firearm and another for assault with a box cutter. The officers did not follow up on the disposition of the arrests; had they done so, they would have found that both had resulted in convictions on guilty pleas.

In connection with the sting operation, Delvalle was charged with third- and fourth-degree possession of a controlled substance, making an illegal u-turn, and driving without a license; despite Schneider's prediction, he was released on bail on September 28, 2001. The officers did not know that Delvalle had been released and, as a result, did not contact Matican to inform him. Had he known of Delvalle's release and violent history, Matican claims that he would have moved to California to live with his brother.

Matican had no contact with the officers or Delvalle from September 19 to December 8, 2001. On that date, Delvalle attacked Matican and slashed him across the face with a box cutter; Matican claims that during the assault Delvalle said, "You ratted me. . . . Why did you rat me?" Matican Dep. at 173. Delvalle was arrested and charged with first- and second-degree assault; he later pleaded guilty to attempted first-degree assault and was sentenced to eight years' imprisonment and five years' supervised release. In connection with the sting operation, Delvalle pleaded guilty to attempted possession of a controlled substance in the third degree and was sentenced to three to six years' imprisonment,

to be served concurrently with his sentence for the assault on Matican.

All New York City police officers receive a copy of the Patrol Guide, a comprehensive manual that guides officers in the performance of their duties. The officers involved in apprehending Delvalle relied on Procedure No. 212-68 of the Patrol Guide, which sets forth procedures for dealing with CIs and, in particular, for keeping their identities confidential; it does not, however, provide specific guidance for protecting the safety of CIs. Apart from Procedure No. 212-68, the City provides additional written guidance for the use of CIs in narcotics operations, but the officers do not recall relying on such guidance; in any event, while the additional written materials broadly caution officers to consider a CI's safety, they do not specify what steps should be taken to achieve that objective. The officers do not recall receiving any other training on how to protect the identity or safety of CIs participating in sting operations.

Referring to a newspaper article, Matican claims that at least nineteen witnesses were killed in New York City between 1980 and 2003. As Matican was not asked or required to testify as a witness, the relevance of this statistic is unclear. The City does not compile statistics on how many CIs are killed or injured in retaliation for their services.

Appendix B

DISCUSSION

Summary judgment is warranted when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law." Fed.R.Civ.P. 56(c). Although, as noted, the Court must view all evidence in the light most favorable to the non-moving party, that party must still come forward with specific facts showing that there is a genuine issue for trial. *See, e.g., Shannon v. New York City Transit Auth.*, 332 F.3d 95 (2d Cir.2003).

Matican asserts three claims:

> (A) a claim under § 1983 that by failing to protect him from the assault by Delvalle, the officers violated his substantive due-process rights under the Fourteenth Amendment;
>
> (B) a claim under § 1983 that by failing to adequately train its police officers to prevent such constitutional violations, the City is liable under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); and
>
> (C) a claim under state law that the officers' failure to protect him amounted to negligence, and that the City is vicariously liable for that negligence under the doctrine of *respondeat superior.*

The Court will consider each in turn.

Appendix B

A. § 1983 Claim Against the Officers

With regard to Matican's § 1983 claim against the officers, they argue (1) that Matican has failed to establish a constitutional violation, and (2) that, even if he had, they would be entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), requires the Court to address these issues in sequence; that is, the Court must "ask first whether the facts, viewed in the light most favorable to the plaintiff, establish a constitutional violation. . . . If they do not, the plaintiff may not recover because he has suffered no wrong cognizable under § 1983." *Sira v. Morton*, 380 F.3d 57, 68-69 (2d Cir.2004) (citing *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151). "If the facts do establish a constitutional violation, however, [the Court] proceed[s] to a second inquiry, asking 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . . If a reasonable officer could have believed that the challenged conduct was lawful at the time of the violation, then qualified immunity bars the claim." *Id.* (quoting *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151).[3]

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3. The Second Circuit has held that *Saucier's* sequential approach is not required in certain limited circumstances, such as "when the existence of a constitutional violation depends on the resolution of uncertain state law," *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 58 (2d Cir.2003), or where "any unsettled constitutional issues raised" will likely be settled outside the context of § 1983 actions. *Koch v. Town of Brattleboro*, 287 F.3d 162, 166 (2d Cir.2002) (noting that unsettled issues of Fourth Amendment law will often be resolved by rulings on motions to suppress in criminal cases). Those circumstances are not present here.

Appendix B

1. Constitutional Violation

Matican claims that the officers' failure to prevent Delvalle's attack violated his right to substantive due process. Whether the Due Process Clause triggers a duty on the part of governmental actors to provide protection against an attack by private actors in a given factual setting is a question of law appropriate for resolution on summary judgment. *See Ying Jing Gan v. City of New York*, 996 F.2d 522, 534 (2d Cir.1993).

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Supreme Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," *id.* at 195, 109 S.Ct. 998; thus, "[a]s a general matter, a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. 998.

Relying on *dicta* in *DeShaney*, the Second Circuit has recognized two exceptions to this general rule: First, in *Ying Jing Gan*, the court observed that a governmental actor may have a constitutional obligation to protect an individual from private violence "because of a special relationship with [the] individual." 996 F.2d at 533. Second, in *Dwares v. City of New York*, 985 F.2d 94 (2d Cir.1993), the court held that the Due Process Clause is implicated if the governmental actor "assisted in creating or increasing the danger to the victim [of

private violence]." *Id.* at 99. The court recently summarized the state of the law surrounding these two exceptions in *Pena v. DePrisco*, 432 F.3d 98 (2d Cir.2005).

As *Pena* makes clear, the existence of a special relationship or state-created danger is but the first step in the analysis: "[T]o establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' " *Id.* at 112 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). This restriction exists to prevent the Due Process Clause from becoming a "font of tort law." *Lewis*, 523 U.S. at 848, 118 S.Ct. 1708. Thus, "negligently inflicted harm is categorically beneath the threshold of constitutional due process," *Lewis*, 523 U.S. at 849, 118 S.Ct. 1708; however, "[i]n situations where actors have an opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice to 'shock the conscience.' " *Rivera v. Rhode Island*, 402 F.3d 27, 36 (1st Cir.2005), *quoted with approval in Pena*, 432 F.3d at 113.

a. Special Relationship

Matican argues that his CI status constitutes a special relationship. Neither the Supreme Court nor the Second Circuit has addressed the issue of whether CI status is the type of special relationship that will support a substantive due-process claim. Both courts,

however, have recognized that a constitutionally significant special relationship generally involves some type of custody or other restraint on individuals' ability to fend for themselves. *See DeShaney*, 489 U.S. at 200, 109 S.Ct. 998 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."); *Ying Jing Gan*, 996 F.2d at 533 ("Special relationships that have been recognized to give rise to a governmental duty to protect against third-person attacks have included custodial relationships such as a prison and inmate or a mental institution and involuntarily committed patient, and the relationship between a social service agency and foster child.").

District courts in this circuit have deduced from *DeShaney* and *Ying Jing Gan* that there can be no special relationship when such involuntary restraints are not present. *See Clarke v. Sweeney*, 312 F.Supp.2d. 277, 296 (D.Conn.2004) (no special relationship between state and subpoenaed witness); *Smith v. Town of East Haven*, 2005 WL 677284 (D.Conn. Mar.22, 2005) (no special relationship where defendant did not limit plaintiff's freedom of movement or ability to act on her own behalf). For the same reason, other circuit courts have held that there is no special relationship where the plaintiff "voluntarily agreed to serve as a confidential informant." *Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir.1998); *see also Dykema v. Skoumal*, 261 F.3d 701, 704 (7th Cir.2001) (holding that informant did not fall

within special-relationship exception or any other exception to *DeShaney*). Although one district court has held that a special relationship existed between a CI and the police, who had stopped providing protection despite an agreement to do so, *see G-69 v. Degnan*, 745 F.Supp. 254, 265 (D.N.J.1990), that decision has not been followed. *See Summar*, 157 F.3d at 1059 (referring to *G-69* as a "renegade decision").

Here, there is nothing to suggest that Matican was not free to decline becoming a CI; therefore, he does not fit within the special relationship exception to *DeShaney*.

b. State-Created Danger

Matican contends that the state-created danger exception applies because the officers increased the likelihood that he would be attacked by handling the sting operation in such a way that Delvalle knew (or at least surmised) that Matican was responsible for his arrest, and by then failing to follow up on—and inform Matican of—Delvalle's violent nature and release from jail. As the Second Circuit recognized in *Pena*, "the term 'state-created danger' can refer to a wide range of disparate fact patterns," 432 F.3d at 108; the issue is whether the particular fact pattern presented here—namely, the execution of the sting operation in a way that compromised Matican's identity—amounts to a state-created danger.

Appendix B

In *Pena*, the Second Circuit noted in *dicta* that "[o]ur distinction between [the two exceptions to *DeShaney*] suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant," 432 F.3d at 109; here, there is no evidence of a relationship between the officers and Delvalle. The Court, however, takes this aspect of *Pena* simply as a passing recognition that many of the circuit's prior state-created danger cases involved a connection between the governmental actor and the private assailant. The Court does not read *Pena* as establishing such a relationship as a *sine qua non* of state-created danger liability; governmental actors may put an individual in harm's way even in the absence of a connection to a private assailant, and the present case is an example. *See also Kneipp v. Tedder*, 95 F.3d 1199, 1208-09 (3d Cir.1996) (holding that police officer created danger by directing husband to drive home while leaving visibly intoxicated wife to walk home unescorted in cold weather). Thus, that there is no evidence of a relationship between the defendants and Delvalle is of no consequence.

Another aspect of *Pena* provides more significant guidance. *Pena* reiterates that the state-created danger exception applies only when the governmental actor's conduct can be fairly characterized as "affirmative," as opposed to "passive." *Id.* at 109 ("In applying our 'state created danger' principle, we have sought to tread a fine line between conduct that is 'passive' as in

DeShaney and that which is 'affirmative' as in *Dwares.*"). Thus, the court held in *Pena* that encouraging excessive drinking of alcohol on and off duty was sufficiently "affirmative" to trigger the exception, but was careful to point out that simply failing to intercede or punish misconduct would not have been. *See* 432 F.3d at 110-11.

The circuit's other state-created danger cases bear out the active-passive dichotomy. In *Dwares*, for example, the court held that the exception applied because the plaintiff alleged that police officers had told a group of skinheads planning to assault a groups of protesters burning the American flag "that unless they got completely out of control the police would neither interfere with their assaults nor arrest them." 985 F.2d at 97. Similarly, the court applied the exception in *Hemphill v. Schott*, 141 F.3d 412 (2d Cir.1998), in which the plaintiff, a robbery suspect who had been shot by his victim, alleged that police officers had "aided and abetted" the shooting by allowing the victim, a retired police officer, to accompany them in their pursuit of the plaintiff and by providing the victim with a handgun. *See id.* at 418-20. By contrast, in *Pitchell v. Callan*, 13 F.3d 545 (2d Cir.1994), the court held that the exception did not apply when an off-duty police officer did not stop another off-duty officer from shooting a houseguest. *See id.* at 549; *accord Clarke*, 312 F.Supp.2d at 290 (declining to apply the exception to failure to provide police protection to witnesses of murder because "there is nothing in the record indicating that [the police chief] or any of his subordinates encouraged the

[murderers] in any way or affirmatively permitted them to victimize [the witnesses]").

If Matican claimed only that the officers had failed to follow up on, and apprise him of, Delvalle's violent nature and release from jail, his claim would fall squarely on the "passive" side of the line. *See Pena*, 432 F.3d at 110 ("Under *DeShaney*, 'allegations that the defendant officers merely stood by and did nothing' are insufficient to state a constitutional violation." (quoting *Dwares*, 985 F.2d at 99)). Matican's claims are not so limited, however; he also claims that the officers executed the sting operation in such a way that Delvalle learned that Matican had set him up. Such conduct falls on the "affirmative" side of the line because, taking the facts in the light most favorable to Matican, it "assisted in creating or increasing the danger to the victim." *Dwares*, 985 F.2d at 99; *cf. Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir.1998) (applying state-created danger exception to city's release of undercover officers' personal information to counsel for drug conspirators).

c. "Shock the Conscience"

Although the officers' handling of the sting operation can be considered a state-created danger, it does not rise to the level of a substantive due-process violation because, even taking the facts in the light most favorable to Matican, their conduct does not "shock the conscience." There is no indication that the officers intentionally exposed Matican to Delvalle's assault. Moreover, although the officers had time to plan the

operation, it cannot be concluded that they were deliberately indifferent to Matican's safety in making those plans: They rejected as too risky a direct meeting between Matican and Delvalle. In addition, they arrived at a plan whereby Matican would be (and was) kept out of sight and, to further distance the sting from the drug buy, used Delvalle's illegal u-turn as a pretext for stopping him and searching his car. While Matican argues that the officers could have done more to insure his safety (most notably, using fewer cars during the sting and following up on Delvalle's bail status), their failure to do so evinces, at best, negligence, which, as noted, is "categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 849, 118 S.Ct. 1708.

2. Qualified Immunity

As the officers did not violate Matican's substantive due-process rights, his § 1983 claim fails the first step of the inquiry under *Saucier*. Even assuming Matican could make out a constitutional violation, his claim would fail the second step because the officers would be entitled to qualified immunity.

Governmental actors are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "The relevant, dispositive inquiry in determining whether a right is clearly established is

whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151.

For a constitutional right to be clearly established, there must be binding precedent recognizing it: "Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Moore v. Vega*, 371 F.3d 110, 114 (2d Cir.2004). Furthermore, the "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.; see also McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir.1992) ("It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books.").

The existence of the special relationship and state-created danger exceptions to *DeShaney* has been clearly established in the Second Circuit since *Ying Jing Gan* and *Dwares* were decided in 1993; however, that level of abstraction does not define the exceptions with

adequate specificity to defeat qualified immunity. *Cf. Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151 ("[T]here is no doubt that *Graham v. Connor*, [490 U.S. 386, 109 S.Ct. 1865 (1989)], clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough."). The questions is rather whether, at the time of the sting operation in 2001, binding precedent would have reasonably apprised the officers that their conduct fell within one of the exceptions.

As noted, neither the Supreme Court nor the Second Circuit has held that CI status creates a "special relationship" sufficient to trigger a constitutional duty to protect the CI from private violence. Similarly, although the Court is of the opinion that the officers' alleged actions in this case constituted a "state-created danger," there is no binding precedent to put them on notice that using Matican in a sting operation triggered a constitutional duty to protect him from private violence after the operation was concluded. Finally, the Second Circuit cases holding that the requisite conscience-shocking standard had been satisfied have uniformly involved far more egregious behavior, *see Pena*, 432 F.3d at 115 (allowing and encouraging police officers to drink to excess on and off duty); *Hemphill*, 141 F.3d at 418-20 (facilitating robbery victim's ability to shoot robber); *Dwares*, 985 F.2d at 94 (agreeing not to interfere with skinheads' assault on protesters); nothing in those cases would suggest to a reasonable police officer that the officers' handling of the sting operation approached this

level of fault. Moreover, the officers' conduct is not the type that is obviously unlawful even in the absence of case law.

For these reasons, the officers' constitutional obligations to Matican were not, in the circumstances and at the appropriate level of specificity, "clearly established"; therefore, even if Matican had established a constitutional violation, the officers would be entitled to qualified immunity.

B. § 1983 Claim Against the City

Although "Congress did not intend municipalities to be held liable [under § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort," *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[,] the government as an entity is responsible under Section 1983." *Id.* at 694, 98 S.Ct. 2018. Matican argues that the City is liable under *Monell* because it failed to adequately train its police officers to protect CIs; however, Matican's failure to establish that the officers violated his constitutional rights is fatal to his *Monell* claim in two ways.

First, where a *Monell* claim is based solely on the actions of a municipality's officers, municipal liability cannot exist if the individual defendants have not

violated the plaintiff's constitutional rights. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) ("[N]either *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm."). The Court notes that the Second Circuit has cautioned that *Heller* does not apply where "the injuries complained of are not solely attributable to the actions of named individual defendants." *Barrett v. Orange County Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir.1999). In *Barrett*, for example, the court held that a county's human rights commission could be held liable for retaliatory discharge even if individual commissioners were found not liable because the commission itself had made the termination decision. *See id.* at 350. It is clear, however, that *Heller's* principal holding applies to failure-to-train claims because a municipality's failure to train its officers is only actionable if the failure results in constitutional violations by individual officers. *See Curley v. Village of Suffern*, 268 F.3d 65, 71 (2d Cir.2001) ("Following *Heller*, we have recognized that a municipality cannot be liable for inadequate training or supervision when the officers involved in making an arrest did not violate the plaintiff's constitutional rights."). Since the officers did not violate Matican's constitutional rights, *Heller* bars his failure-to-train claim against the City.

Second, to give rise to liability under *Monell*, a municipality's failure to train its officers must amount

to "deliberate indifference to the constitutional rights of [its] citizens." *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir.1998). In *Walker*, the Second Circuit set out three criteria for meeting this standard:

> First, the plaintiff must show that a policymaker knows to a moral certainty that her employees will confront a given situation .... Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation. . . . Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.

Id. at 297-98 (citations and internal quotation marks omitted).

Even assuming that Matican can satisfy the first two prongs of *Walker*, his failure to show that the officers violated his constitutional rights means he cannot satisfy the third; that is, he cannot demonstrate that lack of training caused the deprivation of his constitutional rights because no such deprivation occurred in the first place. Thus, Matican cannot establish that the City's alleged failure to train its officers constituted deliberate indifference to his constitutional rights.

Appendix B

C. State-Law Claim

The Court has jurisdiction over Matican's state-law negligence claim by virtue of 28 U.S.C. § 1367(a), which provides that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Under 28 U.S.C. § 1367(c), however, a district court "may decline to exercise supplemental jurisdiction" if, among other circumstances, "the district court has dismissed all claims over which it has original jurisdiction." As the Court noted in *Drake v. Laboratory Corporation of America Holdings*, 323 F.Supp.2d 449 (E.D.N.Y.2004), the Second Circuit has set forth several factors to be considered when deciding whether to exercise supplemental jurisdiction: "(1) whether state law claims 'implicate [ ] the doctrine of preemption,' . . . (2) 'judicial economy, convenience, fairness, and comity,' . . . (3) the existence of 'novel or unresolved questions of state law,' . . . (4) whether state law claims 'concern the state's interest in the administration of its government.' " *Id.* at 452 (quoting *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 306 (2d Cir.2003)).

Where, as here, all federal claims have been eliminated before trial, concerns of judicial economy, convenience, fairness and comity usually "point toward declining to exercise jurisdiction over the remaining state-law claims." *Valencia*, 316 F.3d at 305. Moreover, although Matican's negligence claim does not appear

to raise any unsettled issues of state law, the issue of municipal tort liability is the type of "fundamental and complex question [ ] involving the balancing of important policies of state government" that should normally be left to state courts to adjudicate. *Id.* at 308. As there is no issue of federal preemption or other concern counterbalancing these factors, the Court declines to exercise supplemental jurisdiction over Matican's state-law claim.

CONCLUSION

With regard to Matican's § 1983 claims, the defendants' motion for summary judgment is granted and those claims are dismissed with prejudice. Matican's state-law claim is dismissed without prejudice.[4]

SO ORDERED.

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4. Dismissal of Matican's state-law claim creates no statute of limitations issue. Under 28 U.S.C. § 1367(d), "[t]he period of limitations for any claim [for which supplemental jurisdiction is invoked] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." *See also Jinks v. Richland County*, 538 U.S. 456, 461-65, 123 S.Ct. 1667, 155 L.Ed.2d 631 (upholding § 1367(d) as constitutional both facially and as applied to political subdivisions of states).

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED AND FILED JUNE 26, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of June two thousand and eight,

ORDER
No. 06-1983-cv

Robert Matican,

Plaintiff-Appellant,

v

City of New York, John Schneider, Julio C. Ordonez and Chris Zimmerman,

Defendants-Appellees.

Appendix C

Appellant Robert Matican having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Frank Perez
Frank Perez, Deputy Clerk

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No. 08-396

Supreme Court, U.S.
FILED
OCT 27 2008
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MATICAN,

Petitioner,

-v.-

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ, and CHRIS ZIMMERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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October 22, 2008

QUESTION PRESENTED

Did the Court of Appeals correctly affirm the District Court's grant of summary judgment to defendant City of New York because, as a matter of law, the actions of the Police Department in planning and carrying out the arrest of Mr. Delvalle do not shock the contemporary conscience?

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CONCLUSION.....5

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BRIEF IN OPPOSITION TO PETITION

REASON FOR DENYING THE PETITION

THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT. THAT COURT'S ORDER COMPLIES WITH PRECEDENTS OF THIS COURT AND DOES NOT CONFLICT WITH PRECEDENTS OF THE OTHER COURTS OF APPEALS.

The Court of Appeals resolved this matter in complete consistency with the leading precedent of County of Sacramento v. Lewis, 523 U.S. 833 (1998). In that case, this Court addressed the level of culpability that must be proven to satisfy the "shock the contemporary conscience" element of a cause of action under the substantive aspect of the Due Process Clause of the Fourteenth Amendment. At one extreme, this Court stated that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." Id. at 849. At the other extreme, this Court stated that "conduct intended to injure in some way unjustifiable by any governmental interest is the sort of official action most likely to rise to the conscience-shocking level. Id.

This Court continued, in Lewis, to state that levels of culpability between those two extremes, such as recklessness or gross negligence, are "matter[s] for closer calls." Id. This Court counseled "an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." Id. at 850. Among the factors that affect the appropriate measure of conscience-shocking in individual cases are the opportunity for deliberation and the pull of competing obligations. Id. at 853.

Petitioner assumes that an opportunity for deliberation, standing alone, makes deliberate indifference a sufficient level of culpability to satisfy conscience-

shocking in a substantive due process case. He ignores, however, other factors that make an intent to harm the requisite level of culpability in this context. In the instant matter, the police officers had competing obligations: to safeguard petitioner, to protect themselves, and to remove a drug merchant from the streets of the City before he could blight any more lives. The Court of Appeals properly declined to second-guess the weight that the police placed on each of its competing obligations. Compromise in such delicate police decisions is unavoidable. The Court of Appeals correctly held that only an intent to harm would shock the contemporary conscience in that setting.

In Lewis, this Court emphasized that "[r]ules of due process are not, however, subject to mechanical application in unfamiliar territory." Id. at 850. The Court of Appeals correctly held that, in the factual context of this case, only an intent to harm would shock the contemporary conscience. That Court reasonably followed this Court's guidance as to sufficient levels of culpability in substantive due process cases.

Petitioner argues to this Court that the order of the Court of Appeals conflicts with precedents of the other Courts of Appeal. These is no such conflict. In four cases cited by petitioner, the Court of Appeals require proof of an intent to harm in order to prove conscience-shocking. In those cases, accordingly, discussion of a lesser standard is only obiter dictum. Perez v. Unified Government of Wyandotte County, 432 F.3d 1163 (10th Cir. 2005); Fraternal Order of Police Department of Corrections Labor Committee v. Williams, 363 U.S. App. D.C. 1, 375 F.3d 1141 (D.C. Cir. 2004); Neal v. St. Louis County Board of Police Commissioners, Moreland v. Las Vegas Metropolitan Police Department, 159 F.3d 365 (8th Cir. 1998).

In three cases cited by petitioner, the Court of Appeals did not have to decide upon an appropriate level of

culpability because the evidence did not suffice to prove culpability above the level of negligence. In those cases, accordingly, discussion of a lesser standard is only obiter dictum. King v. East St. Louis School District 189, 496 F.3d 812 (7th Cir. 2007); Schieber v. City of Philadelphia, 320 F.3d 409 (3d Cir. 2003); Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir.).

In only one case cited by petitioner did the Court of Appeals actually hold that proof of deliberate indifference would suffice to prove shock of the contemporary conscience. In Brown v. National Bank Corp., 188 F.3d 579 (5th Cir. 1999), the plaintiffs sued federal agents and cooperating private businesses who made them targets of an undercover operation designed to detect contract procurement fraud in the space industry. The Court of Appeals held that proof of deliberate indifference would suffice to prove shock of the contemporary conscience. Id. at 592. Absent from that case, however, was any police obligation to remove a dangerous criminal from the streets. Furthermore, the Court of Appeals dismissed the case on grounds of qualified immunity. The factual context of Brown is quite distinguishable from that of the instant case.

In sum, the Court of Appeals resolved the instant case reasonably and in full compliance with Lewis. There is no conflict among the Courts of Appeals for this Court to harmonize. This is not an appropriate case for review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
October 23, 2008

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 08-396

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTION

This Reply Brief is submitted in further support of Matican's[1] petition for a writ of certiorari to the Second Circuit, and in response to Defendants' Brief in Opposition.

DEFENDANTS AND THE SECOND CIRCUIT HAVE MISREAD *COUNTY OF SACRAMENTO v. LEWIS*, 523 U.S. 833 (1998), WHICH SHOULD BE INTERPRETED, AS HAVE THE DECISIONS IN THE FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, AND TENTH CIRCUITS, TO REQUIRE THAT AN EMERGENCY SITUATION CONFRONT STATE EXECUTIVE ACTORS BEFORE THE HEIGHTENED *MENS REA* REQUIREMENT OF INTENT TO HARM BECOMES A NECESSARY ELEMENT OF A CIVIL RIGHTS ACTION FOR VIOLATION OF SUBSTANTIVE DUE PROCESS

In their opposition brief, Defendants describe as *dicta*, language in the Third, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuit decisions cited by Matican, and admit only that the Fifth Circuit in *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999), *cert. denied* 530 U.S. 1271 (2000) holds in the same way that Matican advocates, *see* Br. in Opp. 3-4, that is, as requiring intent to harm only in emergency situations wherein state executive actors have behaved in a way that deprived private individuals of substantive due process rights. However, even assuming *arguendo* that

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[1] All defined terms in the Petition are adopted in this Reply Brief.

the cited portions of those decisions were not required to reach their particular holdings, this hardly undercuts Matican's argument as to how these Circuits interpret *Lewis*, or that the reasoning of the decisions of each of these circuits is contrary to the position of the Second Circuit. The Supreme Court rules do not specify that one of the factors considered by the Court in deciding whether to grant *certiorari* is that the holding of one circuit conflicts with the holding of another, only that "a United States court of appeals has entered a *decision* in conflict with the *decision* of another United States court of appeal". U.S. Sup. Ct. R. 10 (emphasis supplied). The word "decision" encompasses *dicta* as well as holdings, and, though not binding, may be followed where "sufficiently persuasive". *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001), citing *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935). Indeed, aspects of *Lewis* which discuss the culpability standard applicable to non-emergency situations could be described as *dicta*, yet discerning their meaning has become the subject of significant debate among scholars, jurists, and litigants, *see, e.g.*, Erwin Chemerinsky, Substantive Due Process, Address Before the Practicing Law Insitute Section 1983 Civil Rights Litigation Symposium, *in* 15 Touro L. Rev. 1501, 1528 (1999) ("*Sacramento v. Lewis* is important because it implies that, apart from emergency situations, deliberate indifference is sufficient for deprivation") (footnote omitted).

In any event, contrary to Defendants' claim, *Brown, supra*, is not the only case Matican cites in which a federal circuit court held that proof of deliberate indifference is sufficient to shock the conscience, Br. in Opp. at 4. For example, Matican cites Eighth and D.C.

Circuit decisions that not only articulate but apply the deliberate indifference standard, *Putnam v. Keller*, 332 F.3d 541, 548 (8th Cir. 2003) (*cited in* Pet. 16 n.7); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001) (applying standard in situation of state-created danger when "deliberation is practical") (*cited in* Pet. 16 for this proposition),[2] as well as another Eighth Circuit decision that applied a recklessness standard, *Wilson*

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[2] *Butera* ultimately held that the defendants therein were entitled to summary judgment on the basis of qualified immunity. *See id.* at 652-54. However, the decision as to whether a constitutional right was violated still constitutes a holding rather than *dicta*. This Court requires in § 1983 cases that the issue of whether a constitutional violation has occurred be determined before that of whether qualified immunity applies. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). This is the case because

> [i]n the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Id. Disregarding the determination as to the existence of a constitutional right as *dicta* based on the recognition of qualified immunity in the same case would defeat this stated purpose.

v. Lawrence County, 260 F.3d 946, 956-57 (8th Cir. 2001). Defendants do not mention or attempt to distinguish *Putnam*, *Butera*, or *Wilson*.

While some of the cases Matican cites found that the conduct at issue was no worse than negligence, Br. in Opp. 3-4, Matican correctly characterizes these cases as providing for the employment of a deliberate indifference standard in non-emergency cases. Thus, *King v. St. Louis, 189*, 496 F.3d 812 (7th Cir. 2007), which found the conduct complained of represented at worst negligence, *id.* at 819, cited, in support of its proposition that a deliberate indifference standard applied, *Lewis* and *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998). *Armstrong* found that *Lewis* "endorsed the use of the deliberately indifferent standard for cases in which the defendants have the luxury of forethought," *id.* at 576, and, given the circumstances in which the defendant confinement guards had time to consider their actions, held that the plaintiff had raised "the serious possibility of deliberate indifference," therefore defeating those defendants' summary judgment motion, *id.* at 580. And while *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002), found that the conduct at issue was negligence at worst, *id.* at 513-16, *Ewolski* was followed in *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 602 (6th Cir. 2005), *cert. denied*, 547 U.S. 1129 (2006), which applied the deliberate indifference standard, *id.* at 602-03, and affirmed the district court's grant of summary judgment to plaintiff, finding that the plaintiff was entitled to judgment as a matter of law that certain police officer defendants had in fact been deliberately indifferent, *id.* at 603.

THE COURT SHOULD SCRUTINIZE THE NATURE AND RELATIVE SIGNIFICANCE OF COMPETING OBLIGATIONS

Even Defendants admit that *Brown*, 188 F.3d 579, holds that deliberate indifference is sufficient to shock the conscience, Br. in Opp. 4, but they attempt to distinguish it on the grounds that it lacked "any police obligation to remove a dangerous criminal from the streets," *id.* However, even assuming *arguendo* that the competing obligation Defendants considered was protection of members of the public, and not themselves, from Dealer, *Brown* is not supportive of Defendants. In the cited case, FBI agents had the obligation of rooting out "contract procurement fraud and other illegal activity committed in the aerospace community," *Brown*, 188 F.3d at 583, no less than the defendants herein had to apprehend drug dealers. Anyone engaged in contract procurement fraud in *Brown* was a "criminal", as was the Dealer in *Matican*. In the absence of being arrested following a successful investigation,[3] those who might be perpetrating fraudulent schemes in *Brown* would continue to pose a "danger" to society at large, as Matican's Dealer would continue to cause harm to his customers, although they were willing participants in his crime. Matican therefore submits that the objective of apprehending the subjects of the investigation in *Brown* was a "serious competing obligation" such that the Second Circuit Decision, had it been applied in *Brown*, would have mandated the result that intent to

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[3] The investigation of *Brown* was unsuccessful in light of the fact that no one was charged with the fraud (*Brown* at 584), but this circumstance does not change the analysis.

harm, rather than deliberate indifference, was necessary to shock the conscience there. Thus, the Second Circuit Decision does conflict with *Brown*, which warns that the Fifth Amendment of guarantee of substantive due process places limits upon government actors' conduct that, when "neither necessary nor proper" on the facts of any given case, cannot be used to "destroy the lives and businesses of innocent non-targets in the name of law enforcement." (*Brown* at 591.)[4]

Ironically, Defendants' opposition brief provides a powerful argument for why the Second Circuit was wrong in holding that even in the absence of an emergency situation, the mere assertion of the existence of a "serious competing obligation" is sufficient to insulate state actors from liability, for this invites defendants to raise disingenuous *post hoc* rationalizations. Although *Lewis* and its language concerning competing obligations long predated the commencement of this action, Defendants did not argue in their briefs to the District Court that they designed the Sting as they did so as to protect themselves or the public,[5] and made only a passing reference to these considerations in their brief to the Second Circuit.

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[4] In addition, Defendants' comment that *Brown* dismissed the case on qualified immunity grounds is irrelevant, for the reasons explained in footnote 2 hereof.

[5] Not surprisingly, the District Court's decision accordingly makes no mention of the need to remove a dangerous drug dealer from the streets or to protect the Defendant officers' own safety, instead citing the halfhearted measures Defendants took to protect Matican (*see* App. 33a-34a).

However, the Second Circuit seized upon the goal of protecting the officers themselves as a competing obligation requiring imposition of the intent-to-harm standard. Now, in opposition to Matican's Petition, Defendants apparently abandon the argument that they took sufficient means to protect Matican, and instead cite the need to "remove a dangerous criminal from the streets" Br. in Opp. 4, "before he could blight any more lives," *id.* at 3. Yet Defendants could not have had an obligation of protecting the public from a "dangerous criminal" that competed with their duty to protect Matican, unless they knew at the time they conceived the Sting that Dealer was dangerous to themselves and to the public. Defendants avoided this argument earlier because if they knew that the Dealer was a serious threat, then they also knew that the Sting subjected Matican to vengeance from a "dangerous criminal", increasing the likelihood the lower courts would have found they had sufficient culpability for their actions to shock the conscience. Defendants did not invoke the safety of themselves or of the public when they believed this position did not suit their purposes, but now seize upon these reasons which they now apparently consider advantageous to them. Such after-the-fact rationalizations underscore the danger of uncritical acceptance of the reasons proffered by law enforcement officers as "competing obligations" to their duty to private individuals whom they have placed in danger, or with whom they have a special relationship.

Furthermore, Defendants fail to rebut Matican's argument in his Petition that the competing obligations arose because of Defendants' own actions. When state actors have time to deliberate, they should consider

alternatives when the liberty interests of individuals are at stake. In Matican's case, the police, in a non-exigent situation, did not have to choose between removing an imminently dangerous drug dealer from the streets and protecting Matican's interests. To the contrary, both of these allegedly competing interests could have been served by designing a plan which would not make obvious Matican's involvement in Dealer's arrest, an approach Defendants have never denied could have been fashioned. Where an alternative to the violation of a liberty interest exists, it should be taken into account in determining whether there has been a violation of substantive due process. In *Washington v. Harper*, 494 U.S. 210, 224 (1990), this Court was faced with the administration of anti-psychotic drugs to an inmate against his will. In rejecting the inmate's Section 1983 claim, the court noted that it had not been shown that there were alternatives that would accommodate the inmate's rights, and which would take into account legitimate government interests. Here, however, such alternatives clearly existed.

Defendants also contend that the Second Circuit "properly declined to second-guess the weight placed on each of its competing obligations" (Br. in Opp. at 3). Yet, every time a court rules that a police search was unconstitutional, or that a police officer used excessive force, the court is "second-guessing" the police, which is a judicial fact of life that can only be avoided by insulating from scrutiny all activities of police officers – if not all state actors (for the Second Circuit Decision is not limited to police officers) – regardless of how disproportionate the injury inflicted thereby to the harm sought to be prevented, or how inappropriate in

light of superior alternatives. Virtually any act can be justified by the claim that in some way the actors performed their duty in the public's interest.

The Defendants' argument that the court should not scrutinize their conduct because this would involve impermissible interference with their choice between competing alternatives, fails to heed the admonition of this Court in *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982), where a decision made by a prison physician in a non-emergency setting was held to be within the ambit of judicial review. There the court expressly states that the mere fact that a physician had made a medical decision relating to an inmate does not make it "certain that professional judgment in fact was exercised." *See also, Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976) (opining, in a case alleging that prison officials failed to respond to a prisoner's request for medical attention, that "where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the deprivation of constitutional due process", thereby crossing the line from medical malpractice to civil rights violation.)

The danger in a court second-guessing law enforcement officers is greatest when there is an emergency situation, as was the case in *Lewis*. As the Fifth Circuit observed in *Wagner v. Bay City, Tex.*, 227 F.3d 316 (5th Cir. 2000), courts should be "careful not to engage in second-guessing officers in situations in which they have to make split-second, on-the-scene decisions while confronted with a violent individual." *Id.* at 321. Yet, this hesitancy does not relieve courts of their

obligation "to determine whether . . . officers' actions [are] objectively unreasonable, in light of clearly-established law at the time, and in light of the information the officers possessed." *Id.* An "undue fear of judicial second-guessing," *Akers v. Caperton*, 998 F.2d 220, 226 (4th Cir. 1993), can create an improper balance between judicial efforts to avoid deterrence to those government servants, and the protecting of liberty interests of private individuals.

THE PUBLIC'S INTEREST IS ADVANCED BY MATICAN'S POSITION, NOT THAT OF THE DEFENDANTS

The public's interest should be a factor in Section 1983 cases but not in the way suggested by the Defendants. As noted by Matican, the credibility of government should not be sacrificed by granting immunity to law enforcement officers from liability for deliberate indifference to the liberty interests of those they have placed in danger by false assurances. (Pet. 30-33.) In arguing of the danger to the public in not apprehending Matican's Dealer in the hastily conceived and clumsily executed Sting that revealed Matican's identity, the Defendants have sidestepped the real issue. Apart from the fact that the holding of the Second Circuit Decision can be applied to anyone to whom the police have a duty to protect, even an approach restricting the Second Circuit Decision to CIs would have an enormous impact, for the use of CIs is commonplace. *See* Fed. Bureau of Investigation, *FY 2008 Authorization and Budget Request to Congress* 4-22, 4-25 (undated) (stating that the FBI receives information provided by over

15,000 "Confidential Human Source[s]"), *available at* http://www.usdoj.gov/jmd/2008justification/office/ 3_01_ justification.doc; U.S. Dep't of Justice, Office of the Inspector General, Audit Report: The Drug Enforcement Agency's Payments to Confidential Sources (July 2005) (stating that the DEA "has approximately 4,000 confidential sources at any one time"), *available at* http://www. usdoj. gov/oig/ reports/ DEA/a05; Jennifer Portman, *Hoffman Case Is Latest in National Debate Over Confidential Informants*, Tallahassee Democrat, May 17, 2008 (stating that Tallahassee Police Department has used 414 confidential informants since 2000). If in the practice of law enforcement, deception of CIs is given judicial sanction, citizens will protect themselves by not cooperating, and accordingly, law enforcement will lose a valuable tool. Law enforcement officials should be more farsighted than the Defendants herein, heeding Pyrrhus's words: "Another such victory and I am undone."

CONCLUSION

The Petition for a Writ of *Certiorari* to the Second Circuit should be granted.

Respectfully submitted,

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